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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1262~~. 761 ~~712~~ 164

THE MONTANA COMPANY (LIMITED) AND RAWLINSON T. BAYLISS, GENERAL MANAGER, PLAINTIFFS IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED SEPTEMBER 1, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 24, 1890.

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1 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in the supreme court of the State of Montana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between The Saint Louis Mining & Milling Company, petitioner, and The Montana Company (Limited), *was* the defendant, and in the proceedings therein against Rawlinson T. Bayliss, its general manager, for contempt, wherein the validity of section three hundred and seventy-six of the Code of Civil Procedure of said State of Montana and the authority sought to be exercised under it was drawn in question as to its validity on the ground of its being repugnant to the Constitution of the United States and the decision and judgment therein rendered was in favor of such its validity, whereby a manifest error hath happened, to the great damage of the said The Montana Company (Limited) and to the said Rawlinson T. Bayliss, as by their complaint appears, we, being willing that the error, if any
2 hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court, the 25th day of March, in the year of our Lord one thousand eight hundred and ninety.

{ Seal of U. S. Circuit Court for the Dist. of Montana, 1890. }

GEO. W. SPROULE,
Clerk of the Circuit Court for the District of Montana.

Allowed by—
HENRY N. BLAKE, *Ch. Justice.*

3 STATE OF MONTANA:

In the Supreme Court.

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that, in obedience to the mandate of the within

writ of error, a duly certified transcript, under the said seal of said court, of the records and proceedings in the cause therein stated, with all things concerning the same except as in the certificate thereof, is hereto attached.

In testimony whereof I hereto set my hand, as clerk of said supreme court, and affix the seal of said court, at my office, in the city of Helena, this 26th day of March, A. D. 1890.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY, *Clerk.*

UNITED STATES OF AMERICA, *ss*:

To the Saint Louis Mining and Milling Company and to McConnell and Clayberg, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday, twelfth day, of October, A. D. 1890, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Montana, wherein The Montana Company (Limited) and Rawlinson T. Bayliss, its general manager, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court of the United States, this 25th day of March, in the year of our Lord one thousand eight hundred and ninety.

[Seal of Supreme Court of Montana.]

HENRY N. BLAKE,
Chief Justice of the Supreme Court of the State of Montana.

Service of the foregoing citation acknowledged this 25th day of March, A. D. 1890.

McCONNELL & CLAYBERG,
Attorneys for the Saint Louis Mining and Milling Company.

STATE OF MONTANA:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Montana, begun and held in the city of Helena, at the court-house, on the sixth day of January, being the first Monday, in the year one thousand eight hundred and ninety, were the following proceedings on the 4th day of February, A. D. 1890, a day of said term, in the cause of St. Louis Mining and Milling Company of Montana, respondents, against The Montana Co., Limited, appellants.

Transcript & Return.

Petition.

In the District Court of the First Judicial District in and for the County of Lewis and Clarke, Territory of Montana.

SAINT LOUIS MINING AND MILLING COMPANY OF MONTANA)
vs.)
THE MONTANA COMPANY (Limited).)

Your petitioner, The St. Louis Mining & Milling Company of Montana, respectfully represents and shows unto this honorable court—

6 1.

That your petitioner now is and at all times hereinafter stated was a corporation duly incorporated under the laws of the Territory of Montana, and as such has been at all times hereinafter stated and now is engaged in the business of mining in the said county of Lewis & Clarke and Territory aforesaid.

That the said Montana Company (Limited) at all times hereinafter stated was and now is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain and transacting business in the said county of Lewis and Clarke, Territory of Montana.

That each of the said companies was at all times hereinafter stated and now is entitled to own, hold, and possess mining claims, mill sites, and other necessary lands and appurtenances for the purpose of carrying on their said business.

2.

That at said dates your petitioner, The St. Louis Mining and Milling Company of Montana, was and now is the owner of that certain quartz lode mining claim known and designated as the St. Louis
7 quartz lode mining claim, situated in the Ottawa mining district, in the county of Lewis and Clarke and Territory of Montana, which is more particularly described in the notice hereto attached, marked Exhibit "A," and made a part of this petition.

3.

That the said Montana Company (Limited) at the dates aforesaid was and is the owner, in possession of, and operating and controlling what is known as the Marble Heart quartz lode mining claim, the Maskelyne quartz lode mining claim, and the Nine-Hour quartz lode mining claim, a more particular description of which will appear in the notice above referred to, marked Exhibit "A," and made a part of this petition, and to which reference is made.

4.

Your petitioner further represents and shows unto this honorable court that, being desirous of and it being necessary for your said petitioner, The St. Louis Mining and Milling Company of Montana, to have an inspection, examination, and made survey of the premises last aforesaid in order to enable it to institute its action to recover the possession of the said property so owned by it, and for the recovery of such damages as it may have sustained by reason of the taking, extraction, and conversion of the quartz rock, ore, and min-
8 eral taken by the said Montana Company (Limited) from the mining claim and premises so owned by your petitioner, and for the purposes of enabling it to have such inspection, examination, and survey made of its premises and of all veins or deposits of mineral-bearing quartz rock or earth in place the apices of which are within the surface boundaries of the St. Louis mining claim, whether the same pass on the dip thereof outside of the vertical planes extended downward through the side lines of the said claim or not, and for the purpose of securing the rights, benefits, and advantages to which your said petitioner is now entitled under and in pursuance of the provisions of section 376 of the first division of the Code of Civil Procedure of Montana, as found in the compiled laws of the said Territory for the year 1887, said petitioner did serve upon the said Montana Company (Limited) a notice as therein provided, a copy of which is hereto attached and marked Exhibit "A" as aforesaid, which is made a part of this petition, and to which reference is made.

5.

Your petitioner also represents and shows unto this honorable court that the said Montana Company (Limited), being so the owner of the said mining claims hereinbefore mentioned, is in possession of, managing, and controlling certain tunnels, shafts,
9 stopes, winzes, drifts, and excavations within the planes of the exterior boundaries of the said Marble Heart, Maskelyne, and Nine-Hour lode mining claims extending vertically downward and beneath the surface of the said claims and upon veins or deposits of ore the apices of which are within the exterior boundaries of the St. Louis quartz lode mining claim, as above described, and are and have been for a long time extracting large quantities of rock, ore, and mineral therefrom belonging to your said petitioner, and that for a long time have been and are still converting the same to their own use and benefit out of and from the said tunnels, shafts, stopes, winzes, drifts, and excavations upon the same, and that the tunnels, shafts, stopes, winzes, drifts, and excavations upon the several claims of the said Montana Company (Limited) connect with and open into the said veins, quartz, rock, ore, and mineral so belonging to your said petitioner and within the boundaries of the said St. Louis mining claim hereinbefore described and which are the only means accessible for entering into and upon the same, and that the inspection, examination, and survey thereof was and is absolutely requisite and necessary in order to determine the

rights of the respective parties and to ascertain the extent of
10 the trespass, damage, and injury occasioned by the said wrongful and unlawful acts of the said Montana Company (Limited) in so entering the premises of your petitioner and extracting the quartz, rock, ore, and mineral from the same and in constructing their said tunnels, shafts, stopes, winzes, drifts, and excavations thereon; that for said purpose it was and is necessary that your petitioner and such persons as may be designated by this court shall have access to and in the shafts, works, and machinery convenient or necessary to make the inspection, examination, and survey aforesaid wherever the same may be situated or located and over which the said Montana Company (Limited) are in possession and have control; all of which is necessary and requisite for the ascertainment, enforcement, and protection of the rights and interests of your petitioner.

6.

Your petitioner also further shows unto this honorable court that notwithstanding the said notice, a copy of which is hereto attached, was duly served upon the said Montana Company (Limited) on the seventh day of October, A. D. 1889, it, the said Montana Company (Limited), for a period of three days and much more, to wit, since the service of the said notice in writing and a demand duly
11 made in pursuance thereof, refused to allow such inspection, examination, or survey to be had or made; wherefore your petitioner prays that your honor appoint a time and place for hearing his petition, and that an order for service of notice thereof upon the said Montana Company (Limited) be made, and that such proceedings be had and done under section 376 aforesaid as will secure to your petitioner the rights to which it is entitled in pursuance thereof, and that, upon such hearing, an order be made for the inspection, examination, and survey so refused to your petitioner, and that the persons appointed by your honor shall have free access to the premises aforesaid, and that such other or further order be made as shall be appropriate in the premises.

(Signed) WADE, TOOLE & WALLACE,
(Signed) McCONNELL, CARTER & CLAYBERG,
Attorneys for Petitioner.

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

William Mayger makes oath and says that he is the attorney-in-fact and agent for the foregoing petitioner and manager and superintendent of its properties hereinbefore described; that he has heard read the foregoing petition, knows the contents thereof, and that the same is true, to his own knowledge, except as to such matters as are therein stated on information and belief, and as to those
12 he believes it to be true, and that he has reason to believe and does believe that the matters therein stated are true.

(Signed) WM. MAYGER.

Subscribed and sworn to before me this 3rd day of October, 1889.

(Signed) GEO. O. FREEMAN,
Notary Public, Lewis and Clarke Co., M. T.

EXHIBIT "A."

To the Montana Company (Limited):

Whereas the St. Louis Mining and Milling Company of Montana claims to be and is the owner of what is known as the St. Louis quartz lode mining claim, situated in the Ottawa mining district, Lewis and Clarke county, Montana Territory, which is more particularly described in the United States patent heretofore issued therefor as follows:

Beginning, for the description of the lots Nos. 54 and 55 A, at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1, M. C. 54, a mound of stones alongside, from which the quarter-section corner on the south boundary of section thirty six, in township twelve
13 north, of range six west, of the principal meridian, bears south seventy-four degrees and fifteen minutes east, three hundred feet distant.

Thence, first course, magnetic variation nineteen degrees east, south twenty-one degrees and fifteen minutes west one hundred and two feet, intersect line between townships eleven and twelve north of range six west, a granite stone 15 x 14 x 12 inches, marked 54, M. C. 55 A., four hundred and fifty feet to a point from which a shaft bears north sixty-seven degrees west, two hundred and eighty-five feet distant, and from said shaft an open cut, 3 by 5 feet, one hundred feet long, runs south fifty-four degrees east six hundred and fifty-five feet to a point from which a shaft bears west one hundred and fifty-three feet distant, one thousand and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 15 inches, marked 2, M. C. 55 A, a mound of stones alongside, from which the centre of discovery shaft bears north thirty-five degrees and thirty minutes west, two hundred and eighty-nine feet distant.

Thence, second course, magnetic variation nineteen degrees east, south fifty-one degrees and thirty minutes west four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked M. C. 55 A., a mound of stones alongside, from which the south-
14 east location corner bears south ten degrees east, four hundred and thirty-five feet distant.

Thence, third course, magnetic variation nineteen degrees east, north forty-five degrees and thirty minutes west six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4, M. C. 55 A., a mound of stone alongside, from which the southwest location corner bears south seventy-nine degrees west one hundred and eighty-two feet distant.

Thence, fourth course, magnetic variation nineteen degrees east, north fifty-one degrees and fifteen minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5 M. C., 55 A., a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees east, north twenty-one degrees and forty-five minutes east five hundred and twenty-nine and seven-tenths feet, intersect said township line, a granite stone 18 x 14 x 7 inches, marked 55 A., 54 M. C., one thousand and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6, M. C. 54, from which a fir tree thirteen inches in diameter, marked 6, M. C. 54, B. T., bears north 15 degrees east twenty-four feet distant, and a pine tree five inches in diameter, marked 6, M. C. 54, B. T., bears south fifty-four degrees east
15 twenty-one and five-tenths feet distant.

Thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees and thirty minutes east five hundred and fifteen and five-tenths feet to corner No. 1 of lot No. 40, the Drumlermon lode claim, five hundred and seventy-nine feet to corner No. 1, the place of beginning, said lot Nos. 54 and 55 A extending one thousand five hundred feet in length along said St. Louis vein or lode, the granted premises in said lot containing eighteen acres and ninety-three hundredths of an acre.

Whereas the St. Louis Mining and Milling Company of Montana is the owner of and entitled to all the veins or deposits of mineral-bearing quartz, rock, or earth in place, the apices of which are within the surface boundaries of the said St. Louis Quartz Lode mining claim, whether the same pass on the dip thereof outside the vertical planes extended downward through the side lines of the said claim or not; and

Whereas the said St. Louis Mining and Milling Company of Montana is desirous of and it is necessary for the said company, to the ascertainment, enforcement, and protection of its rights, ownership, and claims in and to the said premises and said veins and deposits, as well as any and all trespass, damage, or injury to the same,
16 or any part thereof, and to the extent of its right of recovery thereof, that an inspection, examination, and survey of the said mining claims, veins, and deposits, as above described, be had and made; and

Whereas the Montana Company (Limited) is now in the possession of certain tunnels, shafts, stopes, winzes, drifts, and excavations within the planes of the exterior boundaries of the Marble Heart, Maskelyne, and Nine-Hour quartz lode mining claims, extended vertically downward and beneath the surface of said claims, but upon veins or deposits of ores the apices of which are within the exterior boundaries of the said St. Louis Quartz Lode mining claim, as above described, all of which said Marble Heart, Maskelyne, and Nine-Hour quartz lode mining claims are specifically described.

Marble Heart Lode.

Survey number 1515.

Beginning at corner number 1, from which the quarter-section corner on the south boundary of section 36, township 12 north, range 6 west, bears north eighteen minutes east $459\frac{3}{10}$, and running thence north 32 degrees 7 minutes east $1,355\frac{3}{10}$ feet to corner num-

ber 2; thence north 60 degrees west 450 feet to corner num-
17 ber 3; thence south 38 degrees 24 minutes west 1,369 feet to corner number 4; thence south 60 degrees east 600 feet to corner number 1, the place of beginning.

Maskelyne Lode.

Survey number 1781.

Beginning at corner number one, from which the quarter-section corner on south boundary of section 36, township 12 north, range 6 west, bears north 65 degrees 11 minutes east $493\frac{1}{10}$, thence south 20 degrees 47 minutes west 1,460 feet to corner number 2; thence south 60 degrees east 240 feet to corner number 3; thence south 70 degrees 16 minutes east 281 feet to corner number 4; thence north 19 degrees 30 minutes east 1,422 feet to corner number 5; thence north 60 degrees west 450 to corner number 6; thence north 70 degrees 57 minutes west $42\frac{3}{10}$ feet to corner number 1, the place of beginning.

Nine-Hour Lode.

Survey No. 1705.

Beginning at corner number 1, from which the quarter-section corner on the south boundary of section 36, township 12 north, range 6 west, bears north 53 degrees 14 minutes east $650\frac{7}{10}$ feet; thence south 62 degrees 30 minutes east 326.4 feet to corner number 2; thence south 33 degrees 52 minutes west 1420.83 feet to corner number 3; thence north 62 degrees 30 minutes west
18 $438\frac{5}{10}$ feet to corner number 4; thence north 38 degrees 19 minutes east $1437\frac{6}{10}$ feet to corner number 1, the place of beginning.

And whereas it is the desire of and it is necessary for the said St. Louis Mining & Milling Company of Montana to have the said inspection, examination, and survey made to enable it to institute its action to recover the possession of the said property so held by the said The Montana Company (Limited), and to the recovery of the damages to which the said St. Louis Mining and Milling Company of Montana is entitled by reason of the taking, extracting, and conversion of the quartz, rock, ore, and minerals from the said premises, veins, and deposits as above described, and out of the tunnels, shafts, stopes, winzes, drifts, and excavations upon the same, and upon the said veins or deposits as hereinbefore described, and so in the possession of the said The Montana Company (Limited):

Now, therefore, demand is hereby made, under the provisions of section 376 of the first division of the Code of Civil Procedure of Montana, as found in the compiled laws of the said Territory for the year 1887, on the said The Montana Company (Limited) for and examination, inspection, and survey of the under ground, as herein-
19 before described, and so claimed to be within the planes of the Marble Heart, Maskelyne, and Nine-Hour quartz lode

mining claims, extended vertically downward by the St. Louis Mining and Milling Company of Montana, its agents, servants, attorneys, and employees, and to that end that they have access to any shafts, works, machinery, and entrances convenient or necessary therefor and wherever the same may be situated or located, and over which the said The Montana Mining Company (Limited) have control or in possession, whether upon any of the above-described premises or not; said inspection and examination to be made between the planes of the end lines of the said St. Louis quartz lode mining claim, extended vertically downward and produced across the said Marble Heart, Maskelyne, or Nine-Hour quartz lode mining claims or either of them, and said survey to be made between the said planes, but connected with the surface of the ground of either of said claims or any other claims adjoining through any shaft, tunnel, or means of access thereto now in the possession of or under the control of the said The Montana Company (Limited).

Dated this — day of October, A. D. 1889.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,

(Signed) By WM. MAYGER,
Its Superintendant and Attorney-in-Fact.

20 (Signed) WADE, TOOLE AND WALLACE,
(Signed) McCONNELL, CARTER & CLAYBERG,
Attorneys for the St. Louis Mining Company.

(Endorsed:) "Filed Nov. 6, 1889. W. F. Parker, clerk."

To the Montana Company (Limited):

You will please take notice that the St. Louis Mining and Milling Company have this day filed with the clerk of the district court of the first judicial district of the Territory of Montana in and for the county of Lewis and Clarke a petition asking for an order of court granting to the said company the privilege of making a survey, inspection, and examination of the Marble Heart quartz lode mining claim, in accordance with the provisions of section *of* 376 of the first division of the Code of Civil Procedure of the Territory of Montana, and asking that the court appoint a time and place for the hearing of the said petition, a true copy of which petition and exhibits are hereto attached and made a part of this notice. You will also please take notice that in pursuance of said petition, a true copy of which petition and exhibits are hereto attached and made a part of this notice—. You will also please take notice that in pursuance of
21 said petition and upon application of Messrs. Wade, Toole & Wallace and Messrs. McConnell and Clayberg, attorneys for petitioners, the judge of the said court ordered that the hearing of the said petition be had on the 11th day of November, 1889, at 10 o'clock a. m., at his chambers, in the court-house, in the city of Helena, Lewis and Clarke county, Territory of Montana, a true copy of which order is also hereto attached and made a part of this notice.

You will further please take notice that the St. Louis Mining and

Milling Company of Montana will appear before the judge of the said court at the said time and place for a hearing of said petition.

Dated Helena, Montana, November 6, 1889.

Yours, &c.,

(Signed) WADE, TOOLE AND WALLACE.
(Signed) McCONNELL & CLAYBERG,
Attorneys for Petitioner.
(Signed) ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.
By WM. MAYGER.
Superintendent & Attorney-in-Fact.

STATE OF MONTANA, }
County of Lewis & Clarke, } *ss:*

This day personally appeared before the undersigned Wm. Mayger and makes oath in due form of law that he executed the
22 within notice upon the Montana Company (Limited) by delivering a copy thereof to R. T. Bayliss, the manager and resident director of the Montana Company (Limited) on the 8th day of November, 1889.

(Signed) WM MAYGER.

Subscribed and sworn to before me this 9th day of November, 1889.

[SEAL OF NOTARY.] (Signed) XERXES K. STOUT.

(Endorsed:) Filed Nov. 9, 1889. John Bean, clk. Leon A. Lacroix, D. C.

Venue.

(Title of Cause.)

On reading and filing the petition of the St. Louis Mining and Milling Company of Montana, praying for an order allowing an inspection and survey of certain property alleged to belong to and be in the possession of the Montana Company (Limited), and on motion of Messrs. Wade, Toole and Wallace and McConnell and Clayberg, attorneys for said petitioner, it is hereby ordered that Monday, the 11th day of November, 1889, at ten o'clock in the forenoon of said day, at my chambers, in the court-house, in the city of Helena, is hereby fixed, appointed, and determined as the time and place for hearing such petition. It is hereby further ordered
23 that said petitioner serve notice of the time and place of such hearing upon said Montana Company (Limited) at least one day before the time fixed for said hearing.

Dated Helena, November 6th, 1889.

(Signed) HENRY N. BLAKE, *Judge.*

(Endorsed:) "Filed Nov. 6th, 1889. W. F. Parker, clerk."

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

(Title of Cause.)

Now comes the defendant above named, and, for its answer to the petition of plaintiff on file herein—

1. Denies that there is such a quartz lode mining claim as the alleged St. Louis quartz lode mining claim in the Ottawa mining district, in the county of Lewis and Clarke, Montana.

2. Denies that it is necessary for the plaintiff to have an inspection, examination, or survey of the Marble Heart, the Maskelyne, or Nine-Hour lode mining claims.

24 3. Denies that there is any vein or deposit of ore in the said Marble Heart, Maskelyne, or Nine-Hour lode mining claim which has its apex within the boundary lines of said alleged St. Louis quartz lode mining claim.

4. Denies that this defendant has extracted large or any quantities of rock, ore, or mineral from said Marble Heart, Maskelyne, or Nine-Hour claims from veins or deposits of ore which have their apices on the said alleged Saint Louis quartz lode mining claim.

5. Denies that in said mining claim there are any shafts, tunnels, stopes, winzes, drifts, or excavations in veins, leads, lodes, ledges, or deposits of ore of any kind or character whatever, which have their apices on the said Saint Louis lode mining claims.

6. Denies that any inspection, examination, or survey of the workings of this defendant in said mining claims are absolutely or at all necessary or requisite to determine the rights of the respective parties or either party to this matter.

7. Denies that it has trespassed upon the said alleged Saint Louis mining claim or upon any lead, lode, or ledge having its apex within the boundary lines of said Saint Louis lode mining claim.

8. Denies that it is the owner of the so-called Nine-Hour
25 lode mining claim or the so-called Maskelyne lode mining claim or is in the possession of or controlling either of said lode mining claims.

Wherefore defendant asks to be hence dismissed without day.

(Signed) CULLEN & SANDERS,
Att'ys for Defendant.

(Duly verified.)

(Endorsed:) "Filed Nov'r 21st, 1889. John Bean, clerk."

Venue.

(Title of Cause.)

Be it remembered that on this — day of December, A. D. 1889, the petition of the above-named St. Louis Mining and Milling Company, petitioner herein, for an order, under section No. 376, chapter III, first division, Code of Civil Procedure, Revised Statutes of Montana, coming on to be heard, in pursuance of notice and the order

of the judge of this court heretofore made, and it appearing to the satisfaction of the court, from the evidence produced and after argument of counsel, that it is necessary for the ascertainment, enforcement, and protection of the rights and interests of said petitioner in the mining claim owned by it and described in its said petition and the underground works which are now in possession of said respondent, The Montana Company (Limited), that an inspection, examination, and survey of such mining claim should be made by and through the shafts, drifts, tunnels, levels, works, and stopes in said petition mentioned and for the purpose of eliciting and preserving the facts respecting the same in aid of and auxiliary to any action hereafter to be commenced by it to finally determine, enforce, and protect its said rights and interests in the premises as by it prayed for; and whereas it also appears that said respondent, after due and proper notice in writing, neglected and refused to allow or permit such inspection, examination, and survey;

26

And it appearing to the satisfaction of the court that the matters set forth in said petition for the purposes hereof are true:

It is therefore ordered and adjudged that an inspection, examination, and survey of the shafts, tunnels, drifts, levels, works, and stopes be made as prayed for, commencing on or about the 9th day of December, A. D. 1889, and to continue from day to day, as near as practicable, for the period of twenty days, Sundays excluded, and that John R. Parks, A. D. Churchill, W. M. Mayger, J. S. Keerl, E. R. Hamilton, S. P. Johnson, William H. Jenkins, and Joseph Imhoff be, and they are hereby, nominated and appointed to make such inspection, examination, and survey, with the use of all the necessary means and appliances for such purposes, without let or hindrance from defendant or any one by, through, or under it; and for the purpose of making such inspection, examination, and survey said party shall have the right to pass in and out of the mouths of the tunnels of the defendant without hindrance, said survey to be made during ordinary working hours of the mines—that is to say, during day shift, namely, between seven a. m. and six p. m. from Monday until Friday, inclusive, and from seven a. m. until 5 p. m. on Saturday, one hour each day from twelve *a.* m. to one p. m. to be taken out for meals, no work whatever to be done on Sunday. Said work shall be completed within said twenty days, unless for good cause the court shall order a longer time to be used, the survey by the said petitioner to be confined within the vertical planes of the end lines of the Saint Louis Mining & Milling Company's claim, except so far as it may be necessary to run lines in the tunnels, levels, stopes, drifts, or winzes outside of such planes in order to complete an accurate survey of said workings within the said end lines. No survey points shall be set in said lines by petitioner's survey party except so far as it may be necessary in order to *a* complete a survey of said workings, nor shall any survey points now established in said mine by defendant be obliterated or interfered with, unless it shall be necessary to make the survey herein ordered, and if they are interfered with they

27

28

shall be fully restored by petitioner, the petitioner's survey to be conducted, so far as possible, without interference with the regular and orderly working and operation of the mine or the employés of defendant in the discharge of their various duties, and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine or any matter or data obtained during or resulting from this survey, except to the petitioner, its agents and attorneys. Petitioner's surveyors are not to enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, unless after reasonable notice, not to exceed one hour, such persons shall fail to attend. The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use the pick and remove such material as shall enable them to make such examination.

Given under my hand this 7th day of December, A. D. 1889.

(Signed) WILLIAM H. HUNT,
Judge of said Court.

(Endorsed:) "Filed Dec. 7, 1889. John Bean, cl'k, by J. F. Wilson, d'p'y."

29 *Venue.*

(Title of Cause.)

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

William Mayger makes oath and says that he is the superintendent and agent of and for the petitioner in the above-entitled action, and has the care, custody, possession, charge, and control of its said property and business, and is duly authorized and empowered to carry out and execute the order of court made in this proceeding, a copy of which is hereto attached, marked Exhibit A, and made a part of this affidavit.

That R. T. Bayliss is the resident director, general manager, and superintendent of the Montana Co. (Limited), and has the care, custody, possession, charge, and control of the shafts, drifts, tunnels, levels, works, stopes, machinery, and appliances mentioned and described in said order, and is duly authorized and empowered to carry out or prevent the execution thereof, in so far as said Montana Co. (Limited) is concerned, and is the person charged with the duty of complying with said order, and is liable for contempt in the violation thereof.

30 That on the 9th day of December, A. D. 1889, at the time and place designated and mentioned in said order, and in pursuance thereof, this affiant, with the persons named in said order, delivered a certified copy thereof to the said Bayliss, and requested and demanded the right to enter into and upon the prem-

ises mentioned and described in said order, and by and through the means therein designated, and that the said Bayliss then and there absolutely refused to comply with the said order or to permit this affiant and the persons therein designated to execute and comply with the same, and that, on the contrary thereof, notified this affiant that he did not intend and would not permit the said order to be executed, by reason of which said R. T. Bayliss is guilty of contempt of this court under the statutes in such case made and provided; and affiant asks that he be duly apprehended and arrested and dealt with in accordance with law.

Further affiant sayeth not.

(Signed) WM. MAYGER.

Subscribed and sworn to before me this 11 day of December, 1889.

[SEAL OF NOTARY.] (Signed) XERXES K. STOUT,
Notary Public.

31 EXHIBIT "A."

Venue.

(Title of Cause.)

Be it remembered that on this — day of December, A. D. 1889, the petition of the above-named Saint Louis Mining and Milling Company, petitioner herein, for an order under section No. 376, chapter III, first division, Code of Civil Procedure, Revised Statutes of Montana, coming on to be heard in pursuance of notice and the order of the judge of this court heretofore made, and it appearing to the satisfaction of the court, from the evidence produced and after argument of counsel, that it is necessary for the ascertainment, enforcement, and protection of the rights and interests of said petitioner in the mining claim owned by it and described in its said petition and the underground works which are now in possession of said respondent, The Montana Company (Limited), that an inspection, examination, and survey of such mining claim should be made by and through the shafts, drifts, tunnels, levels, works, and stopes in said petition mentioned, and for the purpose of eliciting and preserving the facts respecting the same in aid of and auxiliary to any action hereafter to be commenced by it to finally determine,
32 enforce, and protect its said rights and interests in the premises as by it prayed for; and whereas it also appears that said respondent, after due and proper notice in writing, neglected and refused to allow or permit such inspection, examination, and survey;

And it appearing to the satisfaction of the court that the matters set forth in said petition for the purposes hereof are true:

It is therefore ordered and adjudged that an inspection, examination, and survey of the shafts, drifts, tunnels, levels, works, and stopes be made as prayed for, commencing on or about the 9th day of December, A. D. 1889, and to continue from day to day, as near as practicable, for the period of twenty days, Sundays excluded, and

that John R. Parks, A. D. Churchill, William Mayger, J. S. Keerl, E. R. Hamilton, S. P. Johnson, William H. Jenkins, and Joseph Imhoff be, and they are hereby, nominated and appointed to make such inspection, examination, and survey, with the use of all the necessary means and appliances for such purposes, without let or hindrance from defendant or any one by, through, or under it; and for the purpose of making such inspection, examination, and survey said party shall have the right to pass in and out the mouths
33 of the tunnels of the defendant without hindrance; said survey to be made during ordinary working hours of the mines—that is to say, during day shift, namely, between seven a. m. and six p. m. from Monday until Friday, inclusive, and from seven a. m. until 5 p. m. on Saturday, one hour each day, from twelve a. m. to one p. m., to be taken out for meals; no work whatever to be done on Sunday. Said work shall be completed within twenty days, unless for good cause the court shall order a longer time to be used.

The survey by the said petitioner to be confined within the vertical planes of the end lines of the Saint Louis Mining and Milling Company's claim, except as far as it may be necessary to run lines in the tunnels, levels, stopes, drifts, or winzes outside of such planes in order to complete an accurate survey of said workings within the said end lines. No survey points shall be set in said lines by petitioner's survey party, except so far as it may be necessary in order to a complete survey of said workings, nor shall any survey points now established in said mine by defendant be obliterated or interfered with unless it shall be necessary to make the survey herein ordered, and if they are interfered with they shall be fully restored by petitioner; the petitioner's survey to be conducted, as
34 far as possible, without interference with the regular and orderly working and operation of the mine or the employes of defendant in the discharge of their various duties, and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine or any matter or data obtained during or resulting from this survey except to the petitioner, its agents and attorneys. Petitioner's surveyors are not to enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, unless, after reasonable notice, not to exceed one hour, such persons shall fail to attend.

The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use the pick and remove such material as shall enable them to make such examination.

Given under my hand this 7th day of December, A. D. 1889.

(Signed) WILLIAM H. HUNT,
Judge of said Court.

35 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I do hereby certify the within and foregoing to be a full, true, and

correct copy of an "order for inspection and survey," this day made, in the matter of The Saint Louis Mining & Milling Co. *vs.* The Montana Company (Limited), said order being now on file and of record in this office.

Witness my hand and the seal of the district court of the first judicial district of Montana this 7th day of December, A. D. 1889.

(Signed) JOHN BEAN, *Clk*,
[SEAL.] By J. F. WILSON, *D'p'y*.

(Endorsed:) "Filed Dec. 12th, 1889. John Bean, clerk."

Venue.

(Title of Cause.)

From the minutes of the clerk of the court of the first judicial district, December 13th, 1889.

"In open court came R. T. Bayliss, Esq., in person and by his attorneys, Cullen & Sanders, and, in answer to process issued out of this court charging the said defendant with contempt of this court by not complying with its order commanding the said R. T.
36 Bayliss, Esq., and the said Montana Company (Limited) to permit plaintiff and its surveyors to make an examination, inspection, and survey of defendant company's mining properties, all as is more fully set forth in the order of this court in the above-entitled case issued on the 7th day of December, 1889, plead guilty to the charge of contempt; whereupon the court fined the said defendant in the sum of $100.00, and ordered that the defendant, R. T. Bayliss, Esq., be imprisoned until he shall have performed the acts required to be performed under the order of this court above referred to, made and on file in this case, a certified copy of which was served upon the said R. T. Bayliss, Esq."

Venue.

(Title of Cause.)

Please take notice that the above-named defendant, The Montana Company (Limited), hereby appeals to the supreme court of the State of Montana from a final order and judgment of said court allowing an inspection, examination, and survey of the Marble Heart, Maskelyne, and Nine-Hour quartz lode mining claims, situate in Ottawa (unorganized) mining district, in the county of Lewis and Clarke and State of Montana, duly made and entered in said
37 action, in the said district court, on the 7th day of December, A. D. 1889.

(Signed) CULLEN AND SANDERS,
Attorneys for Defendant.

To the clerk of said district court and to Messrs. Wade, Toole and Wallace and McConnell & Clayberg, attorneys for said petitioner.

We hereby admit service of a copy of the within notice this 4th day of Dec., A. D. 1889.

(Signed) McCONNELL & CLAYBERG.
(Signed) WADE, TOOLE AND WALLACE,
Att'ys for Petitioner.
(Signed) JOHN BEAN, *Clerk Dist. Court.*

(Endorsed:) Filed Dec. 18th, 1889. John Bean, clerk.

Venue.

(Title of Cause.)

Undertaking an appeal.

Whereas the Montana Company (L't'd) in the above-entitled special proceeding is about to appeal to the supreme court of the State of Montana from a final judgment and order entered against it in said special proceeding in the said district court, in favor of the petitioner in said special proceeding, on the 7th day of De-
38 cember, A. D. 1889, for a survey, examination, and inspection of leads, stopes, and drifts on the Marble Heart, Maskelyne, and 9-Hour lode mining claims, in Ottawa (unorganized) mining district, Lewis and Clarke county, State of Montana:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, freeholders of the city of Helena, county of Lewis and Clarke, and State of Montana, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

Dated this 14th day of December, A. D. 1889.

(Signed) LEWIS H. HERSHFIELD. [L. S.]
(Signed) W. C. WHIPPS. [L. S.]

STATE OF MONTANA, }
County of Lewis and Clarke, } *ss:*

Lewis H. Hershfield and W. C. Whipps, whose names are subscribed as the sureties to the above undertaking, being sev-
39 erally duly sworn, each for himself says that he is worth the sum in the said undertaking specified as the penalty thereof over and above his just debts and liabilities, exclusive of property exempt by law from execution, in the State of Montana.

LEWIS H. HERSHFIELD.
W. C. WHIPPS.

Subscribed and sworn to before me this 14 day of December, A. D. 1889.

(Signed) JAMES U. SANDERS,
[SEAL.] *Notary Public.*
3—1262

(Endorsed:) Filed Dec. 18th, 1889. John Bean, clerk, by H. R. Thompson, deputy clerk.

(*Venue.*)

(Title of Cause.)

To John Bean, Esq., clerk of said dist. court.

SIR: You will please prepare a transcript in the above-entitled special proceeding, consisting of petition, notice, answer, order of court, affidavit of contempt, warrant for arrest of Rawlinson
40 T. Bayliss, general manager of the above-named defendant, order of court made on the hearing thereof, and generally all papers remaining on file and of record in your office pertaining to said matters.

Respectfully,

(Signed) CULLEN & SANDERS,
Att'ys for Def't.

(Endorsed:) Filed Dec'r 16th, 1889. John Bean, clerk.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA
vs.
THE MONTANA COMPANY (Limited).

I, John Bean, clerk of the district court of the first judicial district in and for the State of Montana within and for the county of Lewis and Clarke, do hereby certify that the foregoing 36 pages of transcript, to wit, from page one to page 36, both inclusive, contains a full, true, and correct copy of all papers or proceedings had or filed in the above-entitled matter, as the same appears on file and of record in my office, and the same are hereby returned by me in obedience to a writ of certiorari issued out of the supreme court of the State of Montana, dated on the 13th day of December, A. D. 1889, a copy of which appears in said transcript, and also
41 a precipe for a transcript filed in said matter by the attorneys for the defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said district court, at Helena, Montana, this 4th day of January, A. D. 1890.

[SEAL.] JOHN BEAN,
Clerk of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

Proceedings in Supreme Court.

STATE OF MONTANA:

In the Supreme Court.

STATE OF MONTANA, }
County of Lewis and Clarke, } *ss:*

Rawlinson T. Bayliss, being first duly sworn, says: I am resident

manager of the Montana Company (Limited), an incorporation duly organized under the laws of Great Britain and doing business in the State of Montana; that the said Montana Company (Limited) is the owner of and in the possession of the Drum Lummon quartz lode mining claim and other properties in the county of Lewis and Clarke, State of Montana, and engaged in the business of
42 mining and extracting ores from said mines; that on or about the 6th day of November, A. D. 1889, the Saint Louis Mining and Milling Company of Montana commenced a proceeding in the district court of the first judicial district of the State of Montana within and for the county of Lewis and Clarke, under the provisions of section 376 of the first division of the Code of Civil Procedure, for the purpose of obtaining an examination, inspection, and survey of the Marble Heart quartz lode mining claim, the Maskelyne quartz lode mining claim, and the Nine-Hour quartz lode mining claim, which said several lode mining claims are contiguous to the Drum Lummon quartz lode mining claim aforesaid, and to that end the said Saint Louis Mining and Milling Company filed in said court a petition, a copy of which is hereunto annexed and marked Exhibit "A" and made a part thereof; that upon such petition such proceedings were had as that thereafter the judge of said court, on or about the 7th day of December, A. D. 1889, made an order therein authorizing and empowering John R. Parks, A. D. Churchill, William Mayger, J. S. Keerl, E. R. Hamilton, S. P. Johnson, William Jenkins, and Joseph Imhoff to make a survey,
43 examination, and inspection of the said Marble Heart, Maskelyne, and 9-Hour quartz lode mining claims, a copy of which said order is hereunto attached and marked Exhibit "B" and made a part of this affidavit; that thereupon and on or about the 9th day of December, A. D. 1889, the persons named in said order presented themselves at the mines of the said Montana Company (Limited), in the county of Lewis and Clarke, State of Montana, and *and* demanded admittance thereto for the purpose of making a survey, examination, and inspection of the said several mines mentioned in said order and in accordance with the terms thereof; but that this affiant, being advised that the act under which such proceedings were had was unconstitutional, in that it did not provide due process of law and did deprive the said Montana Company (Limited) of its constitutional right to a trial by jury, and that the said district court did not have jurisdiction to make such order, this affiant refused the said persons admission to said mines; whereupon, and on or about the 12th day of December, A. D. 1889, one William Mayger filed an affidavit in said district court charging affiant with contempt of the order of said court, in
44 that he had so refused admission to said persons mentioned in said order of survey, a copy of which said affidavit is hereto attached, marked Exhibit C, and made a part thereof; and thereupon such proceedings were had that affiant was brought before the judge of the said district court on the 13th day of December, A. D. 1889, and the said judge, after hearing the proof in said matter, adjudged that this affiant should pay a fine of

one hundred ($100) dollars as and for such contempt, and shall stand committed until he should admit the said persons so mentioned in said order into the said Marble Heart, Maskelyne, and 9-Hour quartz lode mining claims, in the shafts, drifts, tunnels, levels, works, stopes, etc., thereunto appertaining, and should in all respects comply with the said order for survey so made by said judge as aforesaid.

That, as affiant is informed and believes, the said district court and the judge thereof exceeded its jurisdiction, in that the said proceedings are not constitutional and do deprive the said The Montana Company (Limited) of its property in said mines without due process of law, and it is so deprived of its property without trial by jury. Affiant further says that, as he is advised, there is no
45 appeal given in or by said statute, and that he has not any other plain, speedy, nor adequate remedy.

Wherefore he prays that a writ of certiorari may issue in said matter, commanding the said district court to certify the said proceedings to the supreme court of this State for review.

RAWLINSON F. BAYLISS.

Subscribed and sworn to before me this 13th day of December, 1889.

[SEAL] W. E. CULLEN,
Notary Public.

"A."

EXHIBIT A.

To the Montana Company (Limited):

You will please take notice that the Saint Louis Mining and Milling Company of Montana have this day filed with the clerk of the district court of the first judicial district of the Territory of Montana in and for the county of Lewis and Clarke a petition asking for an order of court granting the said company the privilege of making a survey, inspection, and examination of the Marble Heart quartz lode mining claim, the Maskelyne quartz lode mining claim, and the 9-Hour quartz lode mining claim, in accordance with the provisions of section 376 of the first division of the Code of
46 Civil Procedure of the Territory of Montana, and asking that the court appoint a time and place for the hearing of the said petition, a true copy of which petition and exhibits are hereto attached and made a part of this notice.

You will also please take notice that, in pursuance of said petition and upon application of Messrs. Wade, Toole and Wallace and Messrs. McConnell and Clayberg, attorneys for petitioners, the judge of the said court ordered that the hearing of the said petition be had on the 11th day of November, 1889, at 10 o'clock a. m., at his chambers in the court-house, in the city of Helena, Lewis and Clarke county, Territory of Montana, a true copy of which order is also hereto attached and made a part of this notice.

You will further please take notice that the Saint Louis Mining and Milling Company of Montana will appear before the judge of the said court at the said time and place for a hearing of said petition.

Dated Helena, Montana, November 6, 1889.

Yours, &, &.

WADE, TOOLE & WALLACE.
McCONNELL AND CLAYBERG,
Attorneys for Petitioner.
SAINT LOUIS MINING AND MILLING CO.
OF MONTANA,
47 By WM. MAYGER,
Superintendent and Attorney-in-Fact.

In the District Court of the First Judicial District in and for the County of Lewis and Clarke, Territory of Montana.

ST. LOUIS MINING AND MILLING CO. OF MONTANA
vs.
THE MONTANA COMPANY (Limited).

Your petitioner, the St. Louis Mining and Milling Company of Montana, respectfully represents and shows unto this honorable court:

1.

That your petitioner now is and at all times hereinafter stated was a corporation duly incorporated under the laws of the Territory of Montana, and as such has been at all times hereinafter stated and now is engaged in the business of mining in the said county of Lewis & Clarke and Territory aforesaid.

That the said Montana Company (Limited), at all times hereafter stated, was and now is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain and transacting business in the said county of Lewis & Clarke,
48 Territory of Montana.

That each of the said companies were at all times hereinafter stated and now is entitled to own, hold, and possess mining claims, mill sites, and other necessary lands and appurtenances for the purpose of carrying on their said business.

2.

That at said dates your petitioner, The St. Louis Mining and Milling Company of Montana, was and now is the owner of that certain quartz lode mining claim known and designated as the St. Louis quartz lode mining claim, situated in the Ottawa mining district, in the county of Lewis and Clarke and Territory of Montana, which is more particularly described in the notice hereto attached, marked Exhibit "A," and made a part of this petition.

3.

That the said Montana Company (Limited) at the dates aforesaid was and is the owner, in possession of, and operating and controlling what is known as the Marble Heart quartz lode mining claim, the Maskelyne quartz lode mining claim, and the 9-Hour quartz lode mining claim, a more particular description of which will appear in the notice above referred to, marked Exhibit "A," and made a part of this petition, and to which reference is made.

4.

Your petitioner further represents and shows unto this honorable court that, being desirous of and it being necessary for your said petitioner, The St. Louis Mining and Milling Company of Montana, to have an inspection, examination, and survey made of the premises last aforesaid in order to enable it to institute its action to recover the possession of the said property so owned by it and for the recovery of such damages as it may have sustained by reason of the taking, extraction, and conversion of the quartz rock, ore, and mineral taken by the said Montana Company (Limited) from the mining claim and premises so owned by your petitioners; and for the purposes of enabling it to have such inspection, examination, and survey made of its said premises and of all veins or deposits of mineral-bearing quartz rock or earth in place the apices of which are within the surface boundaries of the St. Louis mining claim, whether the same pass on the dip thereof outside of the vertical planes extended downward through the side lines of the said claim or not, and for the purpose of securing the rights, benefits, and advantages to which your said petitioner is now entitled under and in pursuance of the provisions of section 376 of the first division of the Code of Civil Procedure of Montana, as found in the compiled statutes of the said Territory for the year 1887, said petitioner did serve upon the said Montana Company (Limited) a notice as therein provided, a copy of which is hereto attached and marked Exhibit "A," as aforesaid, which is made a part of this petition, and to which reference is made.

5.

Your petitioner also represents and shows unto this honorable court that the said Montana Company (Limited), being so the owner of the said mining claims hereinbefore mentioned, is in possession of, managing, and controlling certain tunnels, shafts, stopes, winzes, drifts, and excavations within the planes of the exterior boundaries of the said Marble Heart, Maskelyne, and 9-Hour quartz lode mining claims, extending vertically downward and beneath the surface of the said claims and upon veins or deposits of ore, the apices of which are within the exterior boundaries of the said St. Louis quartz lode mining claim, as above described, and are and have been for a long time extracting large quantities of ore, rock, and

mineral therefrom belonging to your said petitioner, and that
51 for a long time have been and are still converting the same to their own use and benefit out of and from the said tunnels, shafts, stopes, winzes, drifts and excavations upon the same, and that the tunnels, shafts, stopes, winzes, drifts, and excavations upon the several claims of the said Montana Company (Limited) connect with and open into the side veins, quartz, rock, ore, and mineral so belonging to your said petitioner and within the boundaries of the said St. Louis mining claim, hereinbefore described, and which are the only means accessible for entering into and upon the same, and that the inspection, examination, and survey thereof was and is absolutely requisite and necessary in order to determine the rights of the respective parties and to ascertain the extent of the trespass, damage, and injury occasioned by the said wrongful and unlawful acts of the said Montana Company (Limited) in so entering the premises of your petitioner and extracting the quartz, rock, ore, and mineral from the same, and in constructing their said tunnels, shafts, stopes, winzes, drifts, and excavations thereon; that for said purpose it was and is necessary that your petitioner and such persons as may be designated by this court shall have access to and
52 in the shafts, works, and machinery convenient or necessary to make the inspection, examination, and survey aforesaid wherever the same may be situated or located and over which the said Montana Company (Limited) are in possession and have control; all of which is necessary and requisite for the ascertainment, enforcement, and protection of the rights and interests of your petioners.

6.

Your petitioner also further shows unto this honorable court that notwithstanding the said notice, a copy of which is hereto attached was duly served upon the said Montana Company (Limited) on the seventh day of October, A. D. 1889, it, the said Montana Company (Limited), for a period of three days and much more, to wit, since the service of the said notice in writing and a demand duly made in pursuance thereof, refused to allow such inspection, examination, or survey to be had or made.

Wherefore your petitioner prays that your honor appoint a time and place for hearing this petition, and that an order for service of notice thereof upon the said Montana Company (Limited) be made; that such proceedings be had and done under section 376 aforesaid as will secure to your petitioner the rights to which it is entitled in pursuance thereof, and that upon such hearing an order be
53 made for the inspection, examination, and survey so refused to your petitioner, and that the persons appointed by your honor shall have free access to the premises aforesaid for the purposes aforesaid, and that such other or further order be made as shall be appropriate in the premises.

(Signed) WADE, TOOLE AND WALLACE,
(Signed) McCONNELL, CARTER & CLAYBERG, *Attorneys for Petitioner.*

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

William Mayger makes oath and says that he is the attorney-in-fact and agent for the foregoing petitioner and manager and superintendent of its properties hereinbefore described; that he has heard read the foregoing petition, knows the contents thereof, and that the same is true to his own knowledge, except as to such matters as are therein stated on information and belief, and as to these he believes it to be true, and that he has reason to believe and does believe that the matters therein stated are true.

(Signed) WM. MAYGER.

Subscribed and sworn to before me this 31st day of October, 1889.

(Signed) GEORGE O. FREEMAN,
Notary Public, Lewis and Clarke Co., M. T.

54 EXHIBIT "A"

To the Montana Company (Limited):

Whereas the St. Louis Mining and Milling Company of Montana claims to be and is the owner of what is known as the St. Louis quartz lode mining claim, situated in the Ottawa mining district, Lewis and Clarke county, Montana Territory, which is more particularly described in the United States patent heretofore issued thereof as follows:

Beginning at the designation of the lots Nos. 54 and 55 A at corner No. 1, a gravity stone 16 x 12 x 12 inches, marked 1, M. C. 54, a mound of stone alongside, from which the quarter-section corner on the south boundary of section thirty-six, in township twelve north of range six west of the principal meridian, bears south seventy-four degrees and fifteen minutes east, three hundred and fifty-three feet distant; thence, first course, magnetic variation nineteen degrees east, south twenty-one degrees and fifteen minutes west one hundred and two feet intersect line between townships eleven and twelve north of range six west, a granite stone 15 x 14 x 12 inches, marked 54, M. C. No. four hundred and fifty feet to a point from

55 which a shaft bears north sixty-seven degrees west, two hundred and eighty-five feet distant, and from said shaft an open cut 6 by 5 feet, one hundred feet long, bears south fifty-four degrees east six hundred and fifty-five feet to a point from which a shaft bears west one hundred and fifty-three feet distant, one thousand and ninety seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2, M. C. 55 A, a mound of stone alongside, from which the center of discovery shaft bears north thirty-five degrees and thirty minutes west, two hundred and eighty-nine feet distant.

Thence, second course, magnetic variation nineteen degrees east, south fifty-one degrees and thirty minutes west four hundred and three feet, to corner No. 3, a slate stone 14 x 10 x 4 inches, marked M. C. 55 A, a mound of stone alongside, from which the southeast

location corner bears south ten degrees east four hundred and thirty-five feet distant; thence, third course, magnetic variation nineteen degrees east, north fifty-five degrees and thirty minutes west six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches marked 4, M. C. 55 A, a mound of stones alongside from which the southeast location corner bears south seventy-nine degrees west, one hun-
56 dred and eighty-two feet distant; thence fourth course, magnetic variation nineteen degrees east, north fifty-one degrees and fifteen minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5, M. C. 55 A, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees east, north twenty-one degrees and forty-five minutes east five hundred and twenty-nine and seven-tenths feet intersect said township line, a granite stone 18 x 14 x 7 inches, marked 55 A, 54 M. C., one thousand and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6, M. C. 54, from which a fir tree thirteen inches in diameter, marked 6, M. C. 54, B. T., bears north fifteen degrees east, twenty-four feet distant, and a pine tree five inches in diameter, marked 6, M. C. 54, B. T., bears south fifty-four degrees east, twenty-one and five-tenths feet distant; thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees and thirty minutes east five hundred and fifteen and five-tenths feet to corner No. 1 of lot No. 40, the Drum Lumon lode claim, five hundred and seventy-nine feet to corner No. 1, the place of beginning, said lots
Nos. 54 & 55 A extending one thousand five hundred feet in
57 length along said St. Louis vein or lode, the granted premises *is* said lot containing eighteen acres and ninety-three-hundre-ths of an acre.

Whereas the St. Louis Mining and Milling Company of Montana is the owner of and entitled to all the veins or deposits of mineral-bearing quartz, rock, or earth in place the apices of which are within the surface boundaries of the said St. Louis quartz lode mining claim, whether the same pass on the dip thereof outside the vertical planes extended downward through the side lines of the said claim or not; and

Whereas the said St. Louis Mining and Milling Company of Montana is desirous of and it is necessary for the said company to the ascertainment, enforcement, and protection of its rights, ownership, and claims in and to the said premises and said veins and deposits, as well as any and all trespass, damage, or injury to the same or any part thereof, and to the extent of its right of recovery thereof, that an inspection, examination, and survey of the said mining claim, veins, and deposits as above described be had and made; and

Whereas the Montana Company (Limited) is now in the possession of certain tunnels, shafts, stopes, winzes, drifts, and ex-
58 cavations within the planes and exterior boundaries of the Marble Heart, Maskelyne, and Nine-Hour quartz lode mining claims extended vertically downward and beneath the surface of said claims, but upon veins or deposits of ores the apices of which are within the exterior boundaries of the said St. Louis quartz lode

mining claim, as above described, all of which said Marble Heart, Maskelyne, and 9-Hour quartz lode mining claims are specifically described:

Marble Heart Lode.

Survey No. 1515.

Beginning at corner number 1, from which the quarter-section corner on the south boundary of section 36, township 12 north, range 6 west, bears north 18 minutes east 459 $\frac{5}{10}$ feet, and running thence north 32 degrees 7 minutes east 1,355 $\frac{7}{10}$ feet to corner number 2; thence north 60 degrees west 450 feet to corner number 3; thence south 38 degrees 24 minutes west 1,369 feet to corner number 4; thence south 60 degrees east 600 feet to corner number 1, the place of beginning.

Maskelyne Lode.

Survey No. 1781.

Beginning at corner number one, from which the quarter-
59 section corner on south boundary of section 36, township 12 north, range 6 west, bears north 65 degrees 11 minutes east 493 $\frac{1}{10}$ feet, thence south 29 degrees 47 minutes west 1,460 feet to corner number 2; thence south 60 degrees east 240 feet to corner number 3; thence south 70 degrees 16 minutes east 281 feet to corner number 4; thence north 19 degrees 30 minutes east 1,422 feet to corner number 5; thence north 60 degrees west 450 feet to corner number 6; thence north 70 degrees 57 minutes west 42 $\frac{7}{10}$ feet to corner number 1, the place of beginning.

Nine-Hour Lode.

Survey No. 1705.

Beginning at corner number 1, from which the quarter section-corner on the south boundary of section 36, township 12 north, range 6 west, bears north 53 degrees 14 minutes east 650 $\frac{7}{10}$ feet, thence south 62 degrees 30 minutes east 326 $\frac{1}{10}$ feet to corner number 2; thence south 33 degrees 52 minutes west 1,420 $\frac{5}{100}$ feet to corner number 3; thence north 62 degrees 30 minutes west 138 $\frac{5}{10}$ feet to corner number 4; thence north 38 degrees 19 minutes east 1,437 $\frac{7}{10}$ feet to corner number 1, the place of beginning.

And whereas it is the desire of and it is necessary for the
60 said St. Louis Mining and Milling Company of Montana to have the said inspection, examination, and survey made to enable it to institute its action to recover the possession of the said property so held by the said The Montana Company (Limited) and to the recovery of the damages to which the said St. Louis Mining and Milling Company of Montana is entitled by reason of the taking, extracting, and conversion of the quartz, rock, ore, and minerals from the said premises, veins, and deposits, as above described, and

out of the tunnels, shafts, stopes, winzes, drifts, and excavations upon the same, upon the said veins or deposits, as hereinbefore described, and so in the possession of the said The Montana Company (Limited):

Now, therefore, demand is hereby made, under the provisions of section 376 of the first division of the Code of Civil Procedure of Montana, as found in the compiled laws of the said Territory for the year 1887, on the said The Montana Company (Limited) for an examination, inspection, and survey of the underground works, as hereinbefore described, and so claimed to be within the planes of the Marble Heart, Maskelyne, and 9-Hour quartz lode mining claims extended vertically downward, by the said St. Louis Mining and Milling Company of Montana, its agents, servants, attorneys,
61 and employees, and to that end that they have access to any shafts, works, machinery, and entrances convenient or necessary therefor and wherever the same may be situated or located and over which the said The Montana Company (Limited) have control or in possession, whether upon any of the above-described premises or not; said inspection and examination to be made between the planes of the end lines of the said St. Louis quartz lode mining claim extended vertically downward and produced across the said Marble Heart, Maskelyne, or Nine-Hour quartz lode mining claims or either of them, and said survey to be made between the said planes, but not connected with the surface of the ground of either of said claims or any other claims adjoining through any shaft, tunnel, or means of access thereto now in the possession of or under the control of the said The Montana Company (Limited).

Dated this — day of October, A. D. 1889.

(Signed) SAINT LOUIS MINING AND MILLING CO. OF MONTANA,

(Signed) By WM. MAYGER,
Its Superintendent and Attorney-in-Fact.

(Signed) WADE, TOOL AND WALLACE,

(Signed) McCONNELL, CARTER & CLAYBERG,
Attorneys for the St. Louis Mining Company.

62 In the District Court of the First Judicial District in and for the County of Lewis & Clarke, Territory of Montana.

ST. LOUIS MINING AND MILLING CO. OF MONTANA
vs.
THE MONTANA COMPANY (Limited).

On reading and filing the petition of the St. Louis Mining and Milling Company of Montana praying for an order allowing an inspection and survey of certain property alleged to belong to and to be in the possession of the Montana Company (Limited), and on motion of Messrs. Wade, Toole and Wallace and McConnell & Clayberg, attorneys for said petitioner, it is hereby ordered that Monday, the 11th day of November, 1889, at ten o'clock in the forenoon of said day, at my chambers, in the court-house, in the city of Helena,

is hereby fixed, appointed, and determined as the time and place for hearing such petition.

It is hereby further ordered that said petitioner serve notice of the time and place of such hearing upon said Montana Company (Limited) at least one day before the time fixed for said hearing.

Dated Helena, Nov'r 6, 1889.

(Signed) HENRY N. BLAKE, *Judge.*

63 EXHIBIT "C."

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

First Judicial District Court.

SAINT LOUIS MINING AND MILLING COMPANY, Plaintiff, }
vs.
THE MONTANA COMPANY (Limited), Defendants. }

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

William Mayger makes oath and says that he is the superintendent and agent of and for the petitioner in the above-entitled action, and has the care, custody, possession, charge, and control of its said property and business, and is duly authorized and empowered to carry out and execute the order of the court made in this proceeding, and a copy of which is hereto attached, marked Exhibit "A," and made a part of this affidavit.

That R. T. Bayliss is the resident director, general manager, and superintendent of the Montana Company (Limited), and has the care, custody, possession, charge, and control of the shafts, drifts, tunnels, levels, works, stopes, machinery, and appliances men-
64 tioned and described in said order, and is duly authorized and empowered to carry out or prevent the execution thereof, in so far as said Montana Company (Limited) is concerned, and is the person charged with the duty of complying with said order, and is liable for contempt in the violation thereof.

That on the 9th day of December, 1889, at the time and place designated and mentioned in said order and in pursuance thereof, this affiant, with the persons named in said order, delivered a certified copy thereof to the said Bayliss and requested and demanded the right to enter into and upon the premises mentioned and described in said order and by and through the means there designated, and that the said Bayliss then and there absolutely refused to comply with the said order or to permit this affiant and the persons therein designated to execute and comply with the same, and that, on the contrary thereof, — notified this affiant that he did not intend and would not permit the said order to be executed, by reason — which said R. T. Bayliss is guilty of contempt of this court under the stat-

utes in such case made and provided, and affiant asks that he
65 be duly apprehended and arrested and dealt with in accordance with law. Further affiant saith not.

WILLIAM MAYGER.

Subscribed and sworn to before me this 11th day of December, A. D. 1889.

XERXES K. STOUT,
Notary Public.

EXHIBIT B.

In the District Court of the First Judicial District in and for the County of Lewis and Clarke and State of Montana.

Before the Honorable W. H. Hunt, judge of said district.

SAINT LOUIS MINING AND MILLING CO.
v.
MONTANA COMPANY (Limited).

Be it remembered that on this — day of December, A. D. 1889, the petition of the above-named Saint Louis Mining and Milling Company, petitioner herein, for an order under section 376, chapter III, first division, Code of Civil Procedure, Revised Statutes of Montana, coming on to be heard in pursuance of notice and the order of the judge of this court heretofore made, and it appearing to
66 the satisfaction of the court, from the evidence produced and after argument of counsel, that it is necessary for the ascertainment, enforcement, and protection of the rights and interests of said petitioner in the mining claim owned by it and described in its said petition and the underground works which are now in the possession of said respondent, The Montana Company (Limited), that an inspection, examination, and survey of such mining claim should be made by and through the shafts, drifts, tunnels, levels, works, and stopes in said petition mentioned, and for the purpose of eliciting and preserving the facts respecting the same in aid of an auxiliary to any action hereafter to be commenced by it finally to determine, enforce, and protect its said rights and interests in the premises, as by it prayed for; and whereas it also appears that said respondent, after due and proper notice in writing, neglected and refused to allow or permit such inspection, examination, and survey;

And it appearing to the satisfaction of the court that the matters set forth in said petition for the purposes hereof are true—

It is therefore ordered and adjudged that an inspection, ex-
67 amination, and survey of the shafts, drifts, tunnels, levels, works, and stopes be made, as prayed for, commencing on or about the 9th day of December, A. D. 1889, and to continue from day to day, as near as practicable, for the period of twenty days, Sunday excluded, and that John R. Parks, A. B. Churchill, William Mayger, J. S. Keerl, E. R. Hamilton, S. P. Johnson, William Jenkins, and Joseph Imhoff be, and they are hereby, nominated and

appointed to make such inspection, examination, and survey, with the use of all necessary means and appliances for such purpose, without let or hindrance from defendant or any one by, through, or under it, and for the purposes of making such inspection, examination, and survey said persons shall have the right to pass in and out the mouths of the tunnels of the defendant without hindrance, said survey to be made during ordinary working hours of the mine—that is to say, during day shift, namely, between 7 a. m. and 8 p. m. from Monday until Friday, inclusive, and from 7 a. m. until 5 p. m. on Saturday, one hour each day, from 12 *a.* m. to 1 p. m., to be taken out for meals, no work whatever to be done on Sunday; said work shall be completed within said twenty days, unless for good cause the
68 court shall order a longer time to be used, the survey by the said petitioner to be continued within the vertical planes of the end lines of the Saint Louis Mining and Milling Company's claim, except so far as it may be necessary to run lines in the tunnels, levels, stopes, drifts, or winzes outside of such planes and in order to complete an accurate survey of said workings within the said end lines. No survey points shall be set in said lines by petitioner's survey party, except so far as it may be necessary in order to complete survey of said workings, nor shall any survey points now established in said mine by defendants be obliterated or interfered with unless it shall be necessary to make the survey herein ordered, and if they are interfered with they shall be fully restored by petitioner; the petitioner's survey to be conducted so far as possible without interference with the regular and orderly working and operation of the mine or the employes of defendant in the discharge of their various duties, and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine or any matter or data obtained during or resulting from this survey except to the petitioner, its agents, and attorneys.
69 Petitioner's surveyors are not to enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, — after reasonable notice, not to exceed one hour, such persons shall fail to attend.

The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein; but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use a pick and remove such material as shall enable them to make such examination.

Given under my hand this 7th day of December, A. D. 1889.

(Signed) WILLIAM H. HUNT,
Judge of said Court.

Duly certified.

(Endorsed:) "Filed Dec'r 13th, 1889. W. J. Kennedy, clerk supreme court."

70 STATE OF MONTANA:

In the Supreme Court.

SAINT LOUIS MINING AND MILLING COMPANY
vs.
THE MONTANA COMPANY (Limited).

Upon reading and filing the affidavit of Rawlinson T. Bayliss in the above-entitled matter, and it appearing to me that it is a proper case for the issuance of a writ of certiorari therein, it is ordered that a writ of certiorari issue, as in said affidavit prayed, and that the same be made returnable on the first day of the next term of the supreme court in and for the State of Montana.

HENRY N. BLAKE,
Chief Justice of Supreme Court.

Service of foregoing order acknowledged this Dec. 13th, 1889.
W. H. HUNT,
District Judge.

(Endorsed:) "Filed Dec'r 13th, 1889. W. J. Kennedy, clerk supreme court."

71 STATE OF MONTANA:

In the Supreme Court.

SAINT LOUIS MINING AND MILLING COMPANY, Plaintiff,
vs.
THE MONTANA COMPANY (Limited).

The State of Montana to the district court of the first judicial district within and for the county of Lewis & Clarke and to the Honorable William H. Hunt, the judge thereof:

Whereas it manifestly appears to us by the affidavit of Rawlinson T. Bayliss, a party beneficially interested, that in a certain special proceeding pending before you against the Montana Company (Limited), and wherein the Saint Louis Mining and Milling Company is the petitioner, you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being therefore willing to be certified of the said action or proceedings, we therefore command you that you

72 certify fully and send to our supreme court of the State of Montana, on or before the first day of the next term thereof, a transcript of the record and proceedings in the said special proceeding, to wit, the petition, notice, answer, order, affidavits, proceedings for contempt had against Rawlinson T. Bayliss therein, and all papers and records therein, and all things touching the same, as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our said supreme court; and in the meantime we command and

require that the said district court of the first judicial district of the State of Montana and the said judge thereof do absolutely desist from all other & further proceedings in the matter so to be reviewed.

Witness the Honorable Henry N. Blake, chief justice of the supreme court of the State of Montana, and the seal of said supreme court, this 13th day of December, A. D. 1889.

W. J. KENNEDY,
[SEAL.] *Clerk Supreme Court, State of Montana.*

Service of the foregoing writ acknowledgod by me this 13th December, 1889.

WM. H. HUNT,
Judge Dist. Court.

(Endorsed:) "Filed Dec'r 13th, 1889. W. J. Kennedy, clerk supreme court."

73 *Submission.*

JANUARY 25, A. D. 1890.

This cause was on this day argued by counsel, submitted, and taken under advisement by the court.

Judgment of Supreme Court.

FEBRUARY 4TH, A. D. 1890.

This cause came on this day for the judgment and decision of the court on appeal. Whereupon, on consideration, it is now here ordered and adjudged by this court that the order and judgment of the lower court made and rendered on the 13th day of December, A. D. 1889, be, and the same is hereby, affirmed with costs.

And the court delivered the following opinion:

74 *Opinion of the Supreme Court.*

In the Supreme Court of Montana. January Term, 1890.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Respondent,
v.
THE MONTANA COMPANY (Limited), Appellant.

Opinion of the court by BLAKE, *C. J.*:

The St. Louis Mining and Milling Company of Montana filed its petition in the district court of Lewis and Clarke county, and alleged that the petitioner is a corporation under the laws of Montana; that the Montana Company (Limited) is a corporation under the laws of Great Britain; that the petitioner is the owner of the St. Louis quartz lode mining claim, situated in said county; that the

Montana Company (Limited) is the owner of the Marble Heart, the Maskelyne, and the Nine-Hour quartz lode mining claims; "that, being desirous of and it being necessary for your said petitioner * * * to have an inspection, examination, and survey made of the premises last aforesaid in order to enable it to institute its action to recover the possession of the said property so owned by it and for the recovery of such damages as it may have sustained by
75 reason of the taking, extraction, and conversion of the quartz rock, ore, and mineral taken by the said Montana Company (Limited) from the mining claim and premises so owned by your petitioner, and for the purposes of enabling it to have such inspection, examination, and survey made of its said premises and of all veins or deposits of mineral-bearing quartz rock or earth in place, the apices of which are within the surface boundaries of the St. Louis mining claim," * * * a notice was served upon the Montana Company (Limited), which is made a part of the petition; that the Montana Company (Limited) is in the possession of "certain tunnels, shafts, stopes, winzes, drifts, and excavations within the planes of the exterior boundaries of the said Marble Heart, Maskelyne, and Nine-Hour lode mining claims, extending vertically downward and beneath the surface of the said claims and upon veins or deposits of ore, the apices of which are within the exterior boundaries of the St. Louis quartz lode mining claim," and has been extracting large quantities of ore belonging to the petitioner; that the said tunnels, shafts, stopes, winzes, drifts, and excavations of the Montana Company (Limited) connect with the said St. Louis mining claim and are the only means for entering into the same; "that the inspection, examination, and survey thereof was and is absolutely requisite and necessary in order to determine the
76 rights of the respective parties and to ascertain the extent of the trespass, damage, and injury occasioned by the said wrongful and unlawful acts of the said Montana Company (Limited) in so entering the premises of your petitioner and extracting the quartz, rock, ore, and mineral from the same and in constructing their said tunnels, shafts, stopes, winzes, drifts, and excavations thereon; that for said purpose it was and is necessary that your petitioner and such persons as may be designated by this court shall have access to and in the shafts, works, and machinery convenient or necessary to make the inspection, examination, and survey aforesaid" of which the Montana Company (Limited) is in the possession.

The prayer of the petition is as follows:

"Wherefore your petitioner prays that your honor appoint a time and place for hearing this petition, and that an order for service of notice thereof upon the said Montana Company (Limited) be made; that such proceedings be had and done under section 376 aforesaid as will secure to your petitioner the rights to which it is entitled in pursuance thereof, and that upon such hearing an order be made for the inspection, examination, and survey so refused to your petitioner, and that the persons appointed by your honor shall have free access to the premises aforesaid."

The notice which is mentioned contained recitals of facts
77 similar to those of the petition, and was a demand for an inspection, examination, and survey of the under-ground works of the said lode mining claims of the Montana Company (Limited). The petition was filed November 6, 1889, and the judge ordered that the hearing be had five days thereafter. The Montana Company (Limited) appeared and filed an answer which denied the allegations of the petition. The court below made an order "that an inspection, examination, and survey of the shafts, drifts, tunnels, levels, works, and stopes be made as prayed for," continuing twenty days, and designated eight persons to make the same; that "said party shall have the right to pass in and out the mouths of the tunnels of the defendant without hindrance;" that "said work shall be completed within said twenty days unless for good cause the court shall order a longer time to be used, "the survey by the said petitioner to be confined within the vertical planes of the end lines of the Saint Louis Mining and Milling Company's claim, except so far as it may be necessary to run lines in the tunnels, levels, stopes, drifts, or winzes outside of such planes in order to complete an accurate survey of said workings within the said end lines;" * * * the petitioner's survey to be conducted, so far as possible, without interference with the regular and orderly working and operation of the mine or the employees of defendant in the discharge of their
78 various duties, and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine or any matter or data obtained during or resulting from this survey, except to the petitioner, its agents and attorneys; petitioner's surveyors are not — enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, unless after reasonable notice, not to exceed one hour, such persons shall fail to attend. The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use the pick and remove such material as shall enable them to make such examination.

Afterward R. T. Bayliss, the general manager and superintendent of the Montana Company (Limited), and who was in the control of the property which is described in the foregoing order, refused to comply therewith or permit said persons to make the survey. Upon proper proceedings had in the premises Bayliss was arrested and pleaded guilty to the charge of contempt of the court, and was punished by a fine.

The Montana Company (Limited) appeals to this court from the
"final judgment and order * * * allowing an inspec-
79 tion, examination, and survey of the Marble Heart, Maskelyne and Nine-Hour quartz lode mining claims, * * * duly made and entered in said action in favor of the above-named petitioner and against this defendant and from the whole and every part thereof."

Upon the application of the Montana Company (Limited) a writ

of certiorari was issued out of this court to the district court, commanding it to certify fully to this court, and annex to the writ a transcript of the record and proceedings referred, so that the same might be reviewed. The argument upon this hearing has been restricted to one question. Counsel conceded that all the proceedings in the court below have been regular in form and derive their validity from the following section of the Code of Civil Procedure:

"Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim and the person in possession of the same shall refuse for a period of three days, after demand therefor in writing, to allow such inspection, examination, or survey to be had or made the party so desiring the same may present to the district court or a judge thereof of the county wherein the mine, lead, lode, or mining claim is situated a petition under oath setting out his interest in the premises, describing the same; that the premises are are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing either party may read affidavits, and if the court or judge is satisfied that the facts stated in the petition are true he shall make an order for an inspection, examination, or survey of the lode or mining claim in question in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner." § 376.

It is contended that this statute is unconstitutional, and authorizes the inspection, examination, and survey of the mining property of the Montana Company (Limited) upon the petition of the St. Louis Mining and Milling Company of Montana and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief and may be summarized under the following heads: This law may be made an instrument of oppression and injustice; the quality of the interest of the petitioner is not defined; no bond is required to be given to secure the payment of the

damages which may result to the owner of the property which is invaded; no appeal is allowed from the order of the court or judge in granting the prayer of the petitioner; the power of the court or judge is vast and can practically confiscate any mine in the State; the innocent owners of mining property are injured without "due process of law" and arbitrarily deprived of the right of trial
82 by a jury. The commanding position of the mineral interests of the State and the importance and extent of this remedy which is applicable to them demand the careful study of the principles which have been invoked by counsel. Before we investigate the propositions which have been announced, it will be instructive to ascertain the origin of this provision of the code, and thereby discover its purpose. The source is unquestionably found in the chancery practice of England, and we must review the cases, which are generally controversies affecting coal lands. In the Earl of Lonsdale *vs.* Curwen, 3 Bligh O. S., 168, an order was made, in the year 1799, that the plaintiff and his servants "should be at liberty to inspect the workings of the defendant under the plaintiff's inclosures." It is shown by affidavits that an inspection of the premises was then prevented "because the pipe or air-course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish, and other impediments were lying at the ends, roads, or passages leading to the workings." It was thereupon further ordered that "the defendant should cause the obstruction to be removed and open the air-courses as the viewers should think necessary for such inspection, and that the viewers and such other persons as they should appoint should be at liberty, as often
83 as should be necessary, to make from time to time inspections into the workings of the defendant under the premises of the plaintiff, so as to enable the viewers to make a perfect and complete report of the workings."

In Walker *vs.* Fletcher, 3 Bligh O. S., 172, the same proceedings were had in the year 1804, and it was also ordered that the defendants should remove certain dams and obstructions in their works as the inspectors should direct, so that the plaintiff might view the pit of the defendants.

In Blakesley *v.* Whieldon, 1 Hare, 176, the parties entered, in the year 1838, into a contract for the sale of minerals situated under certain tracts of land. Differences arose as to whether the plaintiff should have power to go down into any of the mines comprised in the contract, or whether the power, if granted, should not be confined to the right to descend any pits or shafts sunk on the land over the demised mines. In pursuance of the opinion of the vice-chancellor a decree was entered "empowering the plaintiff and his agents, at all reasonable times and upon reasonable notice, to enter the mines in the pleadings mentioned and to inspect and measure the same so far as from time to time may be necessary." The vice-chancellor observed that the evidence proved "that the power of inspec-
84 tion was an unusual reservation in cases like the present."

In Lewis *v.* Marsh, 8 Hare, 97, a bill was filed by the lessors of a colliery against the lessees and heard in the high court of chan-

cery in the year 1849. It appears that "there was no provision for inspection in the lease, and the defendants had worked the coal through a shaft in an adjoining mine belonging to themselves, so that the demised mine could only be entered through the defendants' mine." Counsel "moved that the defendants might be ordered to permit the plaintiffs and certain persons mentioned in the notice of motion, all or any of them, with workmen and other necessary assistants, at all reasonable times and from time to time, to have access to the coal works of the plaintiffs in and through the adjoining coal works of the defendants to inspect and examine the said coal works, the property of the plaintiffs, and to ascertain the real extent, state, and condition thereof and the real weight of the coal from time to time worked by the defendants therefrom." They submitted that they "were entitled to the means of proving the fact that the defendants had worked beyond their boundary." The defendants opposed the motion upon the grounds that "the plaintiffs might, if they had desired any such power of inspection, have reserved it in their
lease; but they had made no such contract. * * * The plaintiffs
85 sought not only to inspect the demised coal works, but also to pass, for that purpose, into and through the property of the defendants. No implied contract gave the plaintiffs such a right. Admitting that a power of inspecting their own mine might be impliedly reserved, it must be exercised in a lawful way, at their own expense. The plaintiffs might open a shaft and descend into the mine upon their own property. That must be the extent of their legal right under the contract." The vice-chancellor, in the opinion, says: "I think the case is one in which there is a necessity that the party should be allowed what he asks in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are, and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do." * * * The order of the court is similar to that in Blakesley *v.* Whieldon, *supra*. * * * The defendants objected to the admission into their mine of certain persons mentioned in the notice of the motion, and the plaintiffs consented to withdraw them; "and it is ordered that the defendants do permit the said plaintiffs and the persons so to be appointed * * * to have access to and to view and inspect the said mine and workings; but
this order is not to entitle the plaintiffs to view or inspect
86 any part of the defendants' mine except for the purpose of ascertaining the boundary of the plaintiffs' mine."

In Bernitt *vs.* Whitehouse, 28 Beavan, 119, the master of the rolls says, in the opinion: "It is established by the cases that if a person is making use of his property to the injury of the property of his neighbor, the latter is entitled to an inspection in order to ascertain the extent of the injury, and this court only requires him to show a *prima facie* case. * * * If it were a question depending only on the balance of testimony I should, in this case, be in favor of the defendant, but the court requires the best evidence of the fact, and the best evidence here is by an examination of the workings in the defendant's mine. Sup-

pose a man had a right to the surface and that another person was entitled to the minerals. If the latter insisted that the former had sunk a shaft and was abstracting his minerals, would not this court allow an inspection in order that the facts in dispute might be ascertained? I have acted upon that principle in Adshead *v.* Needham, in which I allowed the plaintiff to go through a gallery in the defendant's mine in order to inspect it. * * * Whenever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing
87 so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the court always allows it if it can be done without injury to the defendant."

In Bennett *vs.* Griffiths, 30 L. J. Q. B., 98, the judgment of the court was delivered by Cockburn, C. J., who said: "The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that as auxiliary to that power the courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to the East India Company *vs.* Kynaston, 3 Bligh O. S., 153, 168, two cases are referred to in which, under circumstances very similar to the present, such orders were made." The learned judge then cites and approves the cases of the Earl of Lonsdale *v.* Curwen, *supra*, and Walker *vs.* Fletcher, *supra*, and adds the following observation: "This latter case, which was decided in the time of Lord Eldon, is a strong assertion of the power to remove obstructions to inspection." See, also, Whaley *v.* Braucker, 10 L. T., N. S., 155. The English authorities which have been collected will be considered further, and we will now notice the American cases to which our attention has been invited. The earliest that we have read is Thornburgh *vs.* Savage Mining Co., 1 Pacific L. Mag., 267, which was decided in the
88 year 1867 in the circuit court of the United States for the district of Nevada. The main issue was whether the property claimed by the plaintiff was a separate and distinct quartz lode from the vast mineral vein which is known as the Comstock lode, and a petition was filed praying for an inspection of the premises. After a full statement of the facts, which it is needless to repeat, Mr. Justice Baldwin delivered the opinion: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.

That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied, and the propriety of exercising that power would seem to be clear indeed in a case where without it the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot

be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and
89 machinery operated by it. It would be a denial of justice and utterly subversive of the objects for which courts were created for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz., Bainbridge on Mines."

The next case in point of time is that of Stockbridge Iron Company *v.* Cone Iron Works, 102 Mass., 80, which was heard in the year 1869. Chief Justice Chapman, in the opinion, says: "The plaintiffs complain that the defendants dug a shaft on their own land near the line of the plaintiffs' land, and thence excavated drifts, extending underground into the plaintiffs' land and took out the ore which they found there. They ask that these drifts may be viewed. The order directs not only that the drifts may be examined by pumping the water out of the shaft and going into it and that the drifts may be examined which lead towards the plaintiffs' land and also those which are under it, but that they may be cleared so far as may be necessary in order to ascertain what iron ore or other mineral has been taken from the land of the plaintiffs and under the surface thereof, and that the viewers may do all acts that may be reasonably necessary to be done to effect the purposes of the decree."

90 The expenses of the explorations amounted to the sum of $4,841.07, and were taxed against the defendants with the costs. Upon this matter the opinion says: "But courts of law have the power to allow the reasonable expenses of surveys and views in proper cases, and the fee bill does not apply to the expense of such proceedings. Mines are so situated that special and peculiar proceedings are sometimes necessary in order to attain the reasonable ends of justice in regard to the under-ground passages by which access to them may be obtained by trespassers."

In the cases of Thornburgh *v.* Savage Mining Co., *supra*, and Stockbridge Iron Co. *v.* Cone Iron Works, *supra*, no authorities relating to this discussion are cited in the opinions and the briefs of the counsel are not reported.

In the year 1877 the case of Thomas Iron Co. *v.* Allentown Mining Co., 28 N. Y. E., 77, was determined. An order for the inspection of a certain mine was made upon the *ex parte* application of the complainants, and the defendants insisted that they should have had notice thereof and an opportunity to be heard. The chancellor says: "In a case like the present, where the application is for the inspection of a worked-out and almost abandoned mine to ascertain the extent of the workings merely, and it appears that leave has been reserved, the granting of the order for inspection is, on the
91 making out of a *prima facie* case entitling the complainant to it, almost a matter of course." After quoting from Bennitt *v.* Whitehouse, *supra*, and Lewis *v.* Marsh, *supra*, he concludes: "If the granting of the order for inspection is a matter of course on a *prima facie* case, notwithstanding the sworn denial of the defendant,

it would seem that it might, at the discretion of the court, be made without notice to the defendant. It is undoubtedly, however, the better practice to require notice enjoining in the meantime so far as may be necessary to preserve the *status quo*." It will be seen that the order of the court below followed an unbroken line of precedents. The rule of equity which has been enforced by the courts of England and America is not of statutory growth. In this State the legislative department has endowed the chancery practice involved in this hearing with the form of law. We are not called upon to decide that the district courts of the State may make the order complained of in the absence of any requirement of the Code of Civil Procedure. We can vindicate with absolute certainty the existence of the right to make an order for the inspection and survey of a lode mining claim when the appropriate steps have been taken by interested parties. The authorities treat the proceedings as the proper mode of securing "the best evidence of which the case in its nature is susceptible." There is not an assertion or suggestion
92 by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey. For this reason a bond to indemnify the persons whose property may be inspected is not asked for or required; but in Bennett *vs.* Griffiths, *supra*, when authority was given for the destruction of a wall to enable the viewers to perform their duty the defendants testified that it would be injurious to their mines if a gate road was driven through the wall, and that the wall which had been erected was only the usual and proper wall erected for the purpose of strengthening the gate road in that portion of the mine." Under these circumstances the plaintiff was ordered to give security to save the defendants from any loss or damage resulting from the inspection.

We have stated that the power of the courts of England over this matter was exercised as a branch of their chancery jurisdiction. In 1854 the common-law procedure act was enacted, and the fifty-eighth section provides that "either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury or by himself or by his witnesses of any real or personal property the inspection of which may be material to the proper determination of the question in dispute, and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order."

* * *

93 In the interpretation of this statute the learned Chief Justice Cockburn, in Bennett *v.* Griffiths, *supra*, said: "The 58th section of the common-law procedure act does not regulate the jurisdiction given to the courts of law by reference to that already exercised by the courts of equity, but we think that as auxiliary to the power of inspection given to the courts of common law there is the same power given to remove obstructions with a view to inspection which was exercised by the courts of equity as auxiliary to their power of ordering inspection."

The section of the code under review does not empower any court or judge to grant an order that is fruitful of injustice or oppression.

Whenever this is done such action will exceed the authority that has been bestowed, and can be rightfully set aside. The bare fact that the St. Louis Mining and Milling Company petitions for an inspection and survey of the mining property referred to before its complaint has been filed is immaterial. The same object is to be attained at all times, regardless of the commencement of the suit, and that is the best evidence for the trial.

In State *vs.* Seymour, 35 N. J. L., 53, the court holds that the surveying and mapping of lands by legislative authority is not a taking thereof, and that it is not a trespass to go thereon for these purposes. In Winslow *v.* Gifford, 6 Cush., 327, it is held that an act of the Legislature is *is* not unconstitutional which authorized
94 certain parties to enter private lands and make surveys and establish boundaries; and Mr. Justice Dewey, in the opinion, says: "In effecting such an object there may be, and often is, a brief and, as it were, momentary interference with the absolute right of the owner of real estate. This exercise of power in its various forms is one of every day's occurrence—indeed, so common as to be acquiesced in without remonstrance or even a question as to the right so to do."

The statute does not provide for an appeal from the order, which has been reviewed, and the writ of certiorari has been properly issued upon the application of the Montana Company (Limited). We are of the opinion that the district court has not exceeded its jurisdiction in determining and granting the petition of the St. Louis Mining and Milling Company of Montana.

It is therefore adjudged that the order and proceedings of the district court be affirmed with costs.

HENRY N. BLAKE,
Chief Justice.

We concur.
E. N. HARWOOD,
WILLIAM H. DE WITT,
Asso. Justices.

95 UNITED STATES OF AMERICA:

In the Supreme Court.

SAINT LOUIS MINING AND MILLING COMPANY, Respondents, *vs.* THE MONTANA COMPANY (Limited) and RAWLINSON T. BAYLISS, Its General Manager, Appellants.	Petition for Writ of Error.

To the Hon. Henry N. Blake, chief justice supreme court of the State of Montana:

And now comes the Montana Company (Limited) and Rawlinson T. Bayliss, its general manager, by their attorneys, Cullen & Sanders, and complain that in the record of proceedings, and also in

the rendition of the judgment, in the proceedings between The Saint Louis Mining and Milling Company, petitioner, against the above-named defendant, The Montana Company (Limited), and in the proceedings therein against the above-named Rawlinson T. Bayliss for contempt of court, in the supreme court of the State of Montana, that being the highest court of law or equity in said State in which a decision could be had therein, and in which a final judgment was rendered against them on the 4th day of February, A. D. 1890
96 in said proceedings; and wherein the said supreme court erred, in that in said proceeding the said petitioner, The Saint Louis Mining and Milling Company, is seeking to exercise an authority under the provisions of section three hundred and seventy-six of the Code of Civil Procedure of the State of Montana, and in which proceeding the validity of said statute is drawn in question on the ground of its being repugnant to that provision of the fourteenth amendment to the Constitution of the United States which prohibits any State from depriving any person of life, liberty, or property without due process of law; that in said matter the decision of said supreme court of the State of Montana was in favor of the validity of such law; that all of said matters and things more fully appear in the record and proceedings in said cause, and that manifest error hath happened, to the great damage of the said The Montana Company (Limited) and to the said Rawlinson T. Bayliss, its general manager.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

CULLEN & SANDERS,
Att'ys for Montana Company (Limited) and Rawlinson T. Bayliss.

Allowed.
HENRY N. BLAKE.
Ch. Justice.

97 MARCH 26TH, 1890.

Comes the appellant, by attorney, and presents to the clerk of this court a writ of error in said cause from the Supreme Court of the United States, filing therewith a copy of said writ, and files the following bond:

Bond.

Supreme Court of the United States.

MONTANA COMPANY (Limited) and RAWLINSON T. BAYLISS, Its General Manager, Plaintiffs in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY, Defendants in Error.

Know all men by these presents that we, The Montana Company (Limited), Rawlinson T. Bayliss, its general manager, and Aaron

Hershfield and W. C. Whipps, of the county of Lewis and Clarke, State of Montana, are held and firmly bound unto the St. Louis Mining and Milling Company in the sum of one thousand dollars, to be paid to the said St. Louis Mining & Milling Company or its assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these
98 presents.

Sealed with our seals and dated this 25th day of March, A. D. 1890.

Whereas the above Montana Company (Limited) and Rawlinson T. Bayliss, its general manager, have prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled action by the supreme court of the State of Montana:

Now, therefore, the condition of this obligation is such that if the above-named The Montana Company (Limited) and Rawlinson T. Bayliss, its general manager, shall prosecute their said writ of error to effect, and if they shall fail to make their plea shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and virtue.

MONTANA COMPANY (LIMITED).
RAWLINSON T. BAYLISS,
General Manager,
By GEORGE H. ROBINSON,
Deputy General Manager.

Sureties:

AARON HERSHFIELD.
W. C. WHIPPS.

99 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Aaron Hershfield and W. C. Phipps, being first duly sworn, each for himself says: I am one of the sureties mentioned in the foregoing bond. I am worth the amount named therein as the penal sum thereof over and above all my just debts and liabilities and exclusive of my property exempt from execution in the State of Montana.

AARON HERSHFIELD.
W. C. WHIPPS.

Subscribed and sworn to before me this 25 day of March, A. D. 1890.

[SEAL.] W. E. CULLEN,
Notary Public.

Approved and supersedeas granted this twenty-sixth day of March, A. D. 1890.

HENRY N. BLAKE,
Ch. Justice of the Supreme Court of the State of Montana.

100 STATE OF MONTANA:

In Supreme Court.

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that the foregoing 99 pages contain a full, true, and complete transcript of the record and proceedings in said court in the cause therein stated, save and except the briefs of counsel.

In testimony whereof I hereto set my hand as clerk and fix the seal of said court, at my office, in the city of Helena, Montana, this 4th day of April, A. D. 1890.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY,
Clerk of the Supreme Court of the State of Montana.

(Endorsed:) "No. 8. In Montana supreme court. St. Louis Mining and Milling Company of Montana against The Montana Company (Limited). Transcript and return. Cullen & Sanders. Filed Jan'y 6th, 1890. W. J. Kennedy, clerk supreme court of Montana."

Endorsed on cover: Montana sup. court. No. 1262. The Montana Company (Limited) and Rawlinson T. Bayliss, general manager, plaintiffs in error, *vs.* The St. Louis Mining and Milling Company. Filed September 1, 1890.

Office Supreme Court U. S.
FILED.
DEC 1 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE MONTANA COMPANY (Limited) and RAWLINSON T. BAYLISS, General Manager, Plaintiffs in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY.

No. 167.

In Error to the Supreme Court of the State of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

This was a petition filed by defendant in error against plaintiff in error, in the District Court of the First Judicial District of the Territory of Montana, in which it was alleged that defendant in error was a duly-organized corporation under the laws of the Territory of Montana, engaged in the business of mining in Lewis and Clarke County, Territory of Montana; that plaintiff in error was a duly-organized corporation under the laws of Great Britain, transacting business in the same county and Territory; that defendant in error was the owner of a quartz lode mining claim known as the St. Louis Quartz Lode Mining Claim, in Lewis and Clarke County; that plaintiff in error was the owner, in possession of, and

operating the Marble Heart quartz lode mining claim, the Maskelyne quartz lode mining claim, and the Nine-Hour quartz lode mining claim (Rec., 3); that it being necessary for defendant in error to have an inspection, examination, and survey of the premises of plaintiff in error, to enable defendant in error to institute its action to recover damages sustained by the taking and conversion of quartz rock, ore, and mineral taken by plaintiff in error from the premises of defendant in error, and to enable defendant in error to examine thereon all veins or deposits of mineral-bearing quartz rock in places the apices of which are within the surface boundaries of defendant's claim; and to secure the rights and advantages to which defendant in error was entitled under section 376 of the Code of Montana Territory, as found in the compiled laws of such Territory for 1887, defendant in error served upon plaintiff in error a notice as therein provided (see copy of notice, Rec., 6, 7, 8, 9; Rec., 4); that plaintiff in error, in operating its claim, used certain tunnels, shafts, stopes, etc., etc., within veins, lodes, etc., whose apices were upon the claim of defendant in error; that plaintiff in error extracted therefrom large quantities of rock, ore, and mineral belonging to defendant in error, and converted the same to its own use; that an inspection and examination of the workings of plaintiff in error in its mining claim was absolutely necessary to determine the rights of the respective parties and to ascertain the extent of the trespass, damage, and injury occasioned by the wrongful acts of plaintiff in error (Rec., 4, 5); that notwithstanding the notice which was served upon plaintiff in error on October 7, 1889, it refused to allow such inspection and examination to be made; defendant in error prayed that the court appoint a time for the hearing of its petition, etc. (Rec., 5); an order was made by Blake, C. J., on November 6, 1889, fixing November 11, 1889, as the day for hearing the petition,

and that notice be served upon plaintiff in error of the same (Rec., 10).

Plaintiff in error made answer to the petition, admitting the organization of the respective companies, and the ownership and operation by them of their respective claims, but denying all the remaining allegations of the petition (Rec., 11).

On December 7, 1889, the court made an order allowing the inspection and examination as prayed for, and appointed certain persons to make the same (Rec., 11, 12, 13); certain proceedings were had against R. T. Bayliss, manager and superintendent for plaintiff in error, and he was found guilty of contempt of court in not complying with its order commanding him to permit defendant in error to make the examination prayed for (Rec., 13, 14, 15, 16); an appeal was taken from the final order of the district court to the Supreme Court of the Territory of Montana (Rec., 16, 17); writ of *certiorari* was prayed for by R. T. Bayliss, manager for plaintiff in error (Rec., 19, 20) and granted (R., 31); C.-J. Blake, in a lengthy opinion, affirmed the order of the district court (Rec., 32, *et seq.*). The case comes to this court upon writ of error.

The error assigned is, that the Supreme Court of Montana affirmed the judgment of the district court of that State (or Territory), when it should have reversed the same, and ordered the dismissal of the petition.

On the first of February, 1892, the defendant in error moved to dismiss this case or to affirm the judgment, insisting that there was no federal question for this court to determine, but on the 29th of that same month this court overruled such motion, thereby, in effect, determining that there was a federal question disclosed in the Record.

The application of the plaintiffs in error to Chief-Justice Blake for a writ of error to the State Supreme Court (Rec., 41–2) states plainly the federal question, which is that

the statute of Montana, apparently sanctioning this proceeding, affronts the Constitution of the United States in depriving persons of property without due process of law.

Chief-Justice Blake, in his opinion (Rec., 32, *et sec.*), summarizes exactly what plaintiffs in error insist upon in this case, thus:

"It is contended that this statute is unconstitutional, and authorizes the inspection, examination, and survey of the mining property of the Montana Company (Limited) upon the petition of the St. Louis Mining and Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the following heads: This law may be made an instrument of oppression and injustice; the quality of the interest of the petitioner is not defined; no bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded; no appeal is allowed from the order of the court or judge in granting the prayer of the petitioner; the power of the court or judge is vast, and can practically confiscate any mine in the State; the innocent owners of mining property are injured without 'due process of law.'"

The section of the Code of Civil Procedure of Montana, upon which this controversy arises, reads as follows:

"Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim and the person in possession of the same shall refuse for a period of three days, after demand therefor in

writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the district court or a judge thereof of the county wherein the mine, lead, lode, or mining claim is situated a petition under oath setting out his interest in the premises, describing the same; that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing either party may read affidavits, and if the court or judge is satisfied that the facts stated in the petition are true he shall make an order for an inspection, examination, or survey of the lode or mining claim in question in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner." § 376.

The court will observe, in examining this Record, that there is no testimony of any sort produced to *satisfy the mind of the district court that the facts stated in the petition were true.* It seems, in the opinion of the district judge, he *was satisfied* the facts were true, but he fails to state what it was that satisfied him; and we are here without anything to show us that, because the case was heard simply upon the petition and the answer thereto, both being sworn to, and neither, of itself, under any system or code of practice, could stand as evidence, but only *as*

pleading; making issues upon which to offer evidence. And the court will also observe that the substantial allegations of the petition are directly and positively denied by the answer, and the judgment should have been, upon this state of the case, for plaintiff in error, because, plainly, the burden of proof was upon the defendant in error, and it made no proof. It may be that the district judge, like Falstaff, who knew the true prince by instinct, knew by instinct that the defendant in error was entitled to what it asked under the petition; there can be no other way to account for the judgment rendered in the district court. The statute is rough and harsh enough at best, without agreeing that under it, the court could grant the relief sought without any proof to sustain the petition itself, when that petition, in all its material allegations, is flatly denied by a pleading in every respect of equal dignity with the petition; and it is obvious that it is a statute of that special innovating, and summary character that requires it to be most strictly construed, and most strictly followed in every particular.

Vanhorne v. *Dorrance, 2 Dall., 304;*
Brown v. *Barry, 3 Ib., 365;*
Shaw v. *R. R. Co., 101 U. S., 557;*
Endl. Int. Stat., secs. 340–344;
Sedg. Const., 299–306.

The statute under which this proceeding is brought, while not entirely without precedent, seems to be one of unusual hardship, and one which might be made the instrument of much oppression and injustice. Its operation, it is true, is confined to mining claims, but if the principle is a good one, no reason is perceived why it might not be extended to any other species of property. The title which a miner obtains to his mining claim differs in no essential respect from that by which any other property is held, so far as the right to equal protec-

tion of law is concerned. If, as in the case at bar, a person, who is about to bring an action of some sort against a mine owner, is to be entitled to go into the premises to make a survey of them to ascertain what development work has been done on them and what ore has been extracted, then it would seem that it would be only even-handed justice to allow one about to commence an action of ejectment against another for a farm, to go upon the demanded premises for the purpose of surveying them that he may get an accurate description for insertion in his complaint, or, for the purpose of enabling him to determine what have been the *mesne* profits, to allow him to go into the bins and granaries of the defendant and measure their contents. No right of this kind existed at common law, nor is such procedure authorized by statute in any State in the Union with reference to any other species of property than mining claims. In California and Colorado a survey is authorized as to mining claims in cases where an action *is brought* for the recovery of the same or some interest therein. In Arizona, New Mexico, and Utah there is no provision for an inspection, examination, or survey, whether with or without action. In this respect they do not differ from the other States and Territories of the Union, with the exception of Nevada, Idaho, and Montana. Nevada and Idaho have statutes substantially like section 376 of the Montana Code of Civil Procedure. It is not unlikely that Idaho and Montana borrowed this provision from Nevada, as the same general features are found in each.

The obnoxious features of section 376 of the Montana Code are apparent at a glance. It is provided that if any person shall have any right to, or interest in any lead, lode, or mining claim, which is in the possession of another person, and there is a necessity for an inspection, examination, or survey, for the ascertainment, enforcement, or protection of such right or interest, a petition may

be presented to a judge at chambers, and upon a single day's notice the judge may make an order granting the petitioner the relief he prays for. The quality of the "right to or interest in" the mining claim, to be shown by the petitioner, is not defined. Any interest, however small, or any right, however vague, indefinite, or uncertain, which the petitioner may show by his affidavits is sufficient to bring him within the purview of the law, and a judge would not be justified in refusing relief if he were satisfied that the petitioner had any interest, or right of any character or description. It does not matter either whether the interest be small or great, the question of interest, if issue is joined, is to be tried by the judge, and for the purposes of the hearing is finally tried by him. If issue is joined upon the allegations in the petition that the petitioner has an interest, it raises a question of fact which ought only to be determined by a jury, unless the parties expressly waive their constitutional right to a trial by jury. In the case at bar and in many cases which might arise, this is the deprivation of the right to trial by jury and the sacrifice of important interests. Without any ascertainment of the rights of the parties, save what may be made by the judge on *ex parte* affidavits, a mine owner may be damaged to an unlimited extent, his property may be practically confiscated, and yet there is no relief or redress for him.

No bond is required to be given to cover damages resulting from this invasion of his rights, nor is there any appeal allowed by the statute from the action of the court or judge in granting the prayer of the petition. Without a bond being required there is no assurance that a suit for damages would be of any avail. The petitioner may be insolvent, and it may even be doubtful whether an action would lie in any event. The maxim of the law is that "*the law wrongs no man*," and there is no hint given us by the statute under consideration that we

may be permitted to recover damages from the petitioner, or that this general principle does not apply to its fullest extent for injuries resulting from these surveys, inspections, and examinations. The injury may be absolutely incalculable. It may amount practically to a confiscation of the property. What is to prevent it? If the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. The power of the court or judge is unlimited in these respects. The manner of making it is entirely discretionary with him. He may permit the petitioner and his experts to visit the property and look at it, or to make surveys or measurements, or to sample and assay the ore, or even to remove one or more tons of it and have an actual mill test. He may limit the time for making such examination to one day or extend it indefinitely, or to any period however remote. He may authorize one person to enter for these purposes, or he may authorize any number of persons to do so, and, whatever the order may be, "*such persons shall thereupon have free access to such mine, lead, lode, or mining claim, for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court.*" Take the case at bar, for instance, as an illustration. All of the ore worked in the mills of the defendant comes through one tunnel. Suppose it is necessary in making the inspection, examination, and survey asked for in the petition herein, that the petitioner and his employés should have possession of this tunnel, and that any attempt on the part of the defendant to carry its ores through that tunnel is an interference with the persons mentioned in the order of the court in the discharge of their duties thereunder. Where is our relief? If the

court has jurisdiction to make any order in the premises we have none. We are absolutely at the mercy of the petitioner and the court. There is no limit fixed within which the judicial discretion is to be exercised. It is a familiar principle that an appellate court will not disturb the order of an inferior court in a purely discretionary matter, unless there has been an abuse of the judicial discretion, and however gross may have been such abuse we seem to be left without any remedy by appeal. No appeal is provided for by the section under consideration, and if any exists it is by virtue of the provisions of the first subdivisions of section 421 of the Code of Civil Procedure, which allows an appeal "*from a final judgment in an action or special proceeding.*" Even if it should be held that the order granting the relief prayed for by the petitioner was a final judgment within the meaning of this section, and that under it an appeal might be taken, the relief is not adequate. There is no method of staying the execution of the order pending the appeal, and a mine owner, so unfortunate as to be a defendant in one of these proceedings, might be ruined before a case presenting the grossest abuse of discretion could be heard in the Supreme Court.

The question as to whether an appeal will lie from an order made in a special proceeding, is one of considerable doubt. The Montana constitution provides (sec. 3, art. 8) that "the appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity." The Supreme Court of California, under a similar provision found in the constitution of that State, held that in a special proceeding, being neither a case at law nor in equity, an appeal would not lie.

Appeal of S. O. Houghton, 42 Cal., p. 36.

This decision was overruled in the case of *Stockton R. R. Co.* v. *Galgiana*, which was an appeal from a proceed-

ing to condemn land, but it was affirmed in *Bixlers' Appeal, 59 Cal., 550,* and this is the last expression of that court upon this question which we have been able to find.

The operation of this statute is not confined to leads, lodes or mining claims in which the petitioner has some interest or right; but "whenever any inspection, examination or survey of any such lode or mining claim shall be necessary to protect, ascertain or enforce the right or interest of any person in another mine, lead, lode or mining claim," he may proceed to invade, tie up and destroy such mine, lode or mining claim in the same manner. For an illustration, let it be assumed that the defendant here with its vast plant of machinery is engaged in operating its Drum Lummon mine, and that the Marble Heart lode and the other properties named in the petition belong to some one else. The petitioner claims an extra lateral right in the Marble Heart because there is a lead having its apex within the surface boundaries of his claim, which, in its downward course passes out of the east side line of his claim and into the surface boundaries of the Marble Heart. In this controversy this defendant has no part or lot, or interest of any kind or character whatever, and yet if this section of the statute is law—is constitutional—it may be deprived of the use and enjoyment of its great property in order that this petitioner may ascertain what his rights are in the Marble Heart. On investigation the petitioner may ascertain that he has no rights in the Marble Heart; that there is no lode in that ground having its apex in the Saint Louis claim; but in the meantime he has damaged irreparably his innocent neighbor. Can this be "due process of law" within the meaning of sec. 27, of art. III. of the State Constitution, or of the Fourteenth Amendment to the Constitution of the United States?

Mr. Webster has defined this phrase for us in the cele-

brated Dartmouth College case (*4 Wheat., p. 519*), and his definition has been accepted by the courts in many cases. He says:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pain and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms would be the law of the land."

So in Bank of Columbia *v.* Oakley, 4 Wheat., 244, the court says:

"As to the words from *Magna Charta* incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In *Westervelt* v. *Gregg, 12 N. Y., p. 209,* Mr. Justice Edwards says that—

"Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass, is, in no sense, the process of law designated by the Constitution."

Penoyer v. *Neff, 95 U. S., p. 714–733;*
Davidson v. *New Orleans, 96 U. S., 97–104;*
Murray's Lessee v. *Hoboken, 18 How., 276.*

In the constitutional guaranty, life, liberty, and property are placed in the same category. One is not protected above the other, and hence it is that courts of justice have ever regarded this clause with peculiar favor as being the very palladium of our liberties. Says Mr. Chief Justice McConnell, in Chauvin *v.* Valiton, 8 Mont., p. 458:

"Those provisions, the most sacred of all constitutional rights of the people of this country, are a limitation upon arbitrary power. They are intended to prohibit arbitrary and unjust legislation."

Bank of the State v. *Cooper, 24 Am. Dec., 517–522;*
Brown v. *Hummel, 47 Am. Dec., p. 434 (S. C., 6 Barr., Pa. 86).*

It does not matter that in the case at bar the order made by Judge Hunt is a fair and reasonable one, and presents no case of abuse of the judicial discretion. In determining its constitutionality the question is not what abuses the particular case presents, but what abuses may or can result from the enforcement of the law in any case. Earl, J., in *Stuart* v. *Palmer, 74 N. Y., p. 183–188,* observes:

"The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

If what may be done under it will operate to deprive a party of his property without a trial according to the process and proceedings of the common law, or law in the regular course of its administration through courts of justice, then it is without "due process of law."

Ex Parte Gage, 79 Am. Dec., p. 533;
4 Kent's Com., 9th ed., 621;
2 Story Const., secs. 1782–89; Ib., 1938–62.

Says Bronson J., in *Taylor* v. *Porter, 4 Hill, 140:*

"The words due process of law in this place can not mean less than a prosecution or suit instituted, and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property."

In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession.

Cooley's Const. Limitations, 5th ed., p. 436;
Lenz v. *Charlton, 23 Wis., 478.*

The word "property," as used in the Constitution, is defined to be the right to have, use, enjoy, and dispose of a thing, and this right may be violated without a physical taking of the property, or any attempt to transfer its title from one to another.

2 Hare Am. Con. Law, p. 759;
Wynehamer v. *The People, 13 N. Y., 433;*
Matter of the Application of Jacobs, 98 N. Y., 105.

In *People* v. *Otis, 90 N. Y., 48*, it is said:

"Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

People v. *Gillson, 109 N. Y., 400.*

There are six, and only six, methods by which the State may legitimately exercise power over private property, and these may be briefly classified as follows:

1. It may regulate the making of contracts with reference to property.

2. It may take property from an individual to compel the fulfillment of a moral or legal obligation.

3. It may deprive him of his property by way of punishment for a violation of law.

4. It may regulate the use of his property under the police power.

5. It may deprive him of his property for the payment of taxes.

6. It may take it for a public use under the law of eminent domain.

Lewis Em. Dom., sec. 2;
Cooley Const. Lim., p. 477.

To justify the making of an order for an inspection, examination, or survey, the petitioner must establish the fact that he has "a right to or interest in" the lead, lode, or mining claim so to be examined or surveyed, or that he is the owner of another mining claim, and that it is necessary for the purpose of protecting, ascertaining, and enforcing his rights in such claim that he should be permitted to inspect, examine, or survey another mining claim belonging to his neighbor. In either case there is a question of ownership—of right or title to real estate to be found by the court. The issue is as material and substantial in all respects as if it were presented in an action of ejectment or trespass. No reason is perceived why the final order made should not have the binding force, as to this issue, of a judgment or decree, and be conclusive between the parties. To say the least of it, this is a very considerable encroachment on the right of trial by jury secured to us by section 23 of article III of the Constitution. At common law the question of title to real estate could only be tried by a jury, and when the Constitution declares that the right to trial by jury shall remain *inviolate*, it can not mean less than that in those cases which were only triable by jury at common law the parties shall be entitled to a jury trial unless the right is expressly waived in the manner pointed out in the Constitution itself. The right seems to be an absolute

one in many of the States, and entirely beyond the discretion of the court to grant or refuse.

Faulk v. *Faulk, 28 Texas, 653;*
Taylor v. *Perron, 2 Hawks, N. C., 298;*
Mounts v. *Byans, 11 Geo., 180;*
Brown v. *Burke, 22 Geo., 574.*

And the possession of the plaintiffs in error raises the strongest kind of presumption of ownership—a presumption highly favored in every system of jurisprudence, resting partly on principles of natural justice and partly on public policy.

Best Princp. Ev. (by Chamberlayne), sec. 296, note 2;
Ib., sec. 366, notes g, h, and i.

And the possession is such a right of property as can not be disturbed except by due process of law, and by compensation or indemnity. And it is not a question of the amount of damages, but it is merely is the right of possession to any extent infringed upon, for the books all speak of the right to *possess*, etc.

2 Hare, sup., 759–60 (notes 3 and 4, p. 759);
Ib., 827, et seq.

The term property may be used, and is often so used, to signify the thing owned, or possessed, or *the rights and privileges*, which together make up the aggregate of use, etc.

Authorities above, and *1 Hare, sup., 357 (notes 4 and 5).*

Then it is safe to say that section 376 of the Montana Code of Civil Procedure is a very pernicious and dangerous piece of legislation, and one liable to great abuse. It engrafts upon the judicial system a principle not known to the common law, and one not found in the laws of any State or Territory in the Union, with two exceptions. Nowhere is it made applicable to any other species of real estate except mining claims, and under its terms the tenure of this class of

property is rendered most precarious. A mine-owner on an *ex parte* hearing, or at best on barely one day's notice, may have possesion of his property taken from him, and be kept out of possession of it indefinitely. And this can be done without any security being given for the payment of his inevitable damages, perhaps without even a cause of action against the petitioner for damages, and without that orderly ascertainment of his rights in a court of justice which is the birthright of every freeman. We do not believe that a miner thus holds his property under the ban of the law, and we do believe that the constitution of Montana extends to it a just and equal protection; and if it does not, surely the Constitution of the United States does. And we submit there was no mistake in our designating, in the first part of this brief, this statute as special, harsh, innovating and summary, as well as unconstitutional.

It is useless to consume time in examining and analyzing the decisions in the English courts of equity, as these courts, with their great powers, make and mould their process, and deal with these questions as equity requires. But here is a statute giving a certain power, which, construed, we say is cruel, and violates the organic law of the Nation, and these English cases do not and can not enlighten us on this point.

And we do think no one can seriously assert this proceeding "*newly devised*" is "in furtherance of any public good," and if it is so claimed, it certainly does not preserve the principles of liberty and justice, and of property, and especially that principle of property rights that sanctions and protects one's *possession*, and will not permit its disturbance without compensation, or indemnity, and a trial—a day in court.

Respectfully,

W. E. CULLEN,
A. H. GARLAND,
H. J. MAY,
For Plaintiffs.

Office Supreme Court U. S.
FILED,
FEB 1 1892

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE MONTANA COMPANY (Limited) AND OTHERS, Plaintiffs in Error,

vs. No. 761

THE ST. LOUIS MINING AND MILLING COMPANY.

IN ERROR TO THE SUPREME COURT OF MONTANA.

Reply of Plaintiffs in Error to the Motion of Defendant to Dismiss the Writ of Error or Affirm the Judgment.

As far as it can be ascertained, this is a proceeding by defendant in error, to get the benefit of the alternatives, to dismiss or affirm, under section 5 of rule 6 of this court.

To reach this desired end, in one shape or another, defendant in error insists no federal question was presented in the court below, so as to give this court jurisdiction (R. S., sec. 709); or, if presented, it is so frivolous as to need no further argument.

It is rather a severe test of our credulity to believe defendant is in earnest in this effort, since it requires an elaborate argument of forty-nine printed pages, to show

the court one of the two things contemplated by the rule referred to. This rule evidently supposed a state of case requiring its operation, would be made to appear in a very brief and simple statement with references to the record to verify the same.

It certainly could not have intended, on such a venture, for the court to be treated to a long and learned disquisition, as to the meaning of *certiorari*, and the offices and purposes of that writ; or as to the mining law in full of a State; or as to the meaning of *due process of law*, as we are in this instance favored with by defendant in error. This would be converting a rule intended to get rid of reviews by this court of cases without any claim to the consideration of the court—mere delay cases—into a device for placing before the court cases with merit in them, upon their merits, and having them disposed of in a summary manner. This court has ever been careful, in all such attempts, to leave such motions to be heard on the argument of the cases on their merits. Aside from the long argument required to show the absence of any federal question, or, if present, its emptiness, if the court will examine the argument filed in support of this motion, it will soon see it is an argument upon the merits, neither more nor less. Indeed, the briefs filed on the merits in the court below by defendant in error are reproduced here in support of this motion.

In view of the construction so repeatedly placed by this court on this rule, we will not enter into a discussion of this motion as the defendant has, but we will content ourselves by trying to show, in addition to what is shown for us by defendant in error, there is a broad federal question plainly exhibited in this record, and it is not frivolous, or of little weight, or unworthy of notice.

The discussion by defendant in error, as to the peculiar nature of *certiorari* in Montana, discloses nothing different from what is understood as to that writ at common

law, or under the practice of the several States, or of the courts of the United States.

1 Tidd Pr., (*Am. Ed.*), *397–8, note A;*
U. S. v. *Young, 94 U. S., 258;*
Harris v. *Barber, 129 U. S., 366–9.*

The *certiorari* being the proper remedy to bring this case from the State District Court to the State Supreme Court, what it carried there was just as much before the State Supreme Court, as if it had got there properly by appeal or writ of error. (*Tidd, Sup., note A.*)

Chief Justice Blake of the Montana Supreme Court says, the writ was properly brought (Rec., 41), and upon its hearing that court affirmed the proceedings of the State District Court with costs (Rec., 41). Here then was a final judgment of that court, and to review this this writ of error is prosecuted.

What was presented then in the court below that can be reviewed here? The Chief Justice of that court states it thus:

"It is contended that this statute is unconstitutional, and authorizes the inspection, examination, and survey of the mining property of the Montana Company (Limited) upon the petition of the St. Louis Mining and Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the following heads: This law may be made an instrument of oppression and injustice; the quality of the interest of the petitioner is not defined; no bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded; no appeal is allowed from the order of the court or judge in granting the prayer of the petitioner; the power of the court or judge is vast, and can practically confiscate any mine in the State; the innocent owners of mining property are injured without 'due process of law.'"

The Chief Justice had no difficulty in finding the federal questions—none at all; and the opinion of the State court can be examined to ascertain what, if any, federal question is presented. (*Gross* v. *United States, etc., 108 U. S., 477*, and cases cited; *Kreiger* v. *Shelby R. R. Co., 125 U. S., 39.*)

This opinion discloses federal questions, formidable, of weight and moment. The court below argues and elaborates them in this opinion fully, and cites English and American authorities at length. And we humbly insist what it took that court a labored effort to determine, and what it required defendant's counsel an equally labored effort to dispose of in this court, can not aptly be put down as trivial or frivolous questions. We should be allowed, at least on our part, an effort as labored to reply to all this, which would be entirely out of order on such a motion as this, if not discourteous to the court.

Plaintiffs in error contend the allowing the defendant the survey and inspection as requested is destructive of all value to property they claim, and the doing it as asked for is unconstitutional. The court below rendered final judgment against them after reviewing these points. If this does not present, in its broadest sense, a federal question decided adversely to the claimant under it, section 709, R. S., is meaningless and without value.

While these are important questions, they are new here, and, therefore, are entitled to full argument by counsel and most mature consideration by the court.

Respectfully,

A. H. GARLAND,
H. J. MAY,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
JAN 11 1892
JAMES H. McKENNEY.
CLERK.

In the Supreme Court

OF THE

United States.

THE MONTANA COMPANY (Limited,) and RAWLINSON T. BAYLISS, General Manager,

Plaintiffs in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY,

Defendants in Error.

In Error to the Supreme Court of the State of Montana.

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

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POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

The questions here presented arise upon the pleadings which appear in the record. They will be considered in the following order :

1st. The motion to dismiss and affirm.

2nd. The position of plaintiffs in error is entirely without merit, and made for delay.

I.

The writ of error in this cause should have issued to the District Court of the First Judicial District of Montana.

The Supreme Court of Montana, in this very case, holds that, as there was no appeal provided for by law, from the District Court, in this special proceeding, it could only exercise its supervisory control over these Courts by bringing up the record for review on the sole question of jurisdiction, by writ of *certiorari*.

See opinion of Chief Justice Blake, p. 41, of Transcript of Record.

The principle that where the statute of a State confers jurisdiction on a court, and makes no provision for an appeal from its judgments, that such judgments are and are intended to be final, is so firmly settled that we deem it unnecessary to cite authorities in its support.

The language of Sec. 709, Revised Statutes of the United States, is as follows: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had," etc.

Now, no decision in the present suit could be had

in the Supreme Court of Montana, under the statutory provisions.

Sec. 554. The writ of *certiorari* may be denominated the writ of review.

Sec. 555. This writ may be granted, on application, by any Court of this Territory, except a justice's, probate or mayor's court. The writ shall be granted in all cases when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal: nor, in the judgment of the court, any plain, speedy, and adequate remedy.

Sec. 556. The application shall be made on affidavit by the party beneficially interested; and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Sec. 557. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record, or proceedings to be certified; when directed to a tribunal, the clerk, if there be one, shall return the writ with the transcript required.

Sec. 558. The writ of review shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

Sec. 559. If a stay of proceedings be not intended, the words requiring the stay shall be omitted from the writ; these words may be inserted or omitted in the sound discretion of the court, but if omitted, the

power of the inferior court or officer shall not be suspended, nor the proceedings stayed.

Sec. 560. The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the court.

Sec. 561. The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board or officer, has regularly pursued the authority of such tribunal, board or officer.

Sec. 562. If the return of the writ be defective the court may order a further return to be made. When a full return has been made the court shall proceed to hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment either affirming or annulling or modifying the proceedings below.

Sec. 563. A copy of the judgment, signed by the clerk, shall be transmitted to the inferior tribunal, board or officer, having the custody of the record or proceeding certified up.

Sec. 564. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, shall constitute the judgment roll. If the proceedings be had in any other than the Supreme Court, an appeal may be taken from the judgment in the same manner and upon the same terms as from a judgment in a civil action.

This comprises the whole of the law of the State of Montana upon the subject of *certiorari*.

That court could only look into the record of the court below to see if such record disclosed a want of jurisdiction, in the lower court, but was powerless to *hear or decide the issues in said suit: it could not decide said suit*, it could only have quashed and annulled all action of the lower court, as void for want of jurisdiction.

The act of Congress contemplates a court in which the issues involved in the suit could be judicially determined.

Dounham vs. Alexandria, 9 Wallace, 659.
Miller vs. Joseph et al., 17 Wallace, 655.

In this latter case, there is close analogy to the case at bar. Miller's application to the Virginia Court of Appeals was based on an alleged denial ot a Federal right. The Virginia Court of Appeals had before it the record of the court below, in order to pass upon its own jurisdiction of the solicited appeal. It declined to allow the appeal and Miller sued out a writ of error to review its action, which was dismissed.

So, in this case, the writ of *certiorari*, issued by the Supreme Court of Montana, as is the conceded office of the writ, simply brought up the record from below, to enable the higher court to see if it had any jurisdiction in the premises, by reason of the plaintiff's allegation of lack of jurisdiction in the court below. In affirming the jurisdiction of the court below, it necessarily denied its own jurisdiction to interfere in the case. To the same effect,

Gregory vs. McVeigh, 23 Wallace, 294.

II.

An examination of the record shows clearly that the alleged Federal question was not raised in the District

Court by any proceeding, plea or motion in the case. See, especially, page 11, transcript of record, where the plaintiff in error answers, but does not rely on the invalidity of the statute, or plead to the jurisdiction, on that ground. That this is fatal to the jurisdiction of this court is clear.

Keith vs. Clark, 97 U. S., 454.
Detroit City Railway Co. vs. Guthard, 114 U. S., 133, and cases cited in the opinion of C. J. Waite.

III.

The writ of *certiorari* is not a suit within the meaning of Section 709, revised Statutes U. S. Its office is simply that of a carrier to bring up the record. Unlike mandamus, prohibition, quo warranto and habeas corpus this writ, *as such*, involves no judicial action on issues raised or made by it. Let the allegations in the petition for its issuance be what they may, the *record* of the lower court is the only evidence of what is in controversy. The Supreme Court of Montana is not, as is this court, fettered by the requirement that the record of its inferior court must show that a jurisdictional question has been *explicitly* raised and decided. It, again, unlike this court, is charged with general superintendence of its inferior courts in the State, and would have issued its "*certiorari*" on a suggestion of *want of jurisdiction* in

the lower court, no matter on what ground the suggestion was based, if at all worthy of consideration. The Constitution of Montana would have annulled the statutory provision assailed in this "*certiorari*" proceeding as fully as the Constitution of the United States would do if such provision were in violation of it. The question before it on the "*certiorari*" was, simply, did the District Court have jurisdiction? That question it determined from an inspection of the record, irrespective of whether that record showed or not that the question of jurisdiction was raised below. This court cannot do this. In this court the record must show that a Federal question was raised and decided in the *suit*.

If "*certiorari*" be held as a "suit itself," independent and supplemental to the "records" it fetches and carries, then all anyone would have to do would be to inject into any suit, by means of an application for a "*certiorari*," Federal questions; and it could never again be held, as in the past, by this court that its writ should run to an inferior State court, where the decision of that court was, by the laws of its State, final, because the *certiorari* route could be traveled in every case through the highest State courts. In Atherton et al. vs. Fowler et al., 91 U. S., page 143, the cases on this head are reviewed by Waite, C. J., who says, page 146, ibid.: "For the

purposes of such a re-examination, we require the record upon which the judgment or decree was given." * *

The whole scope of this decision shows that the record to be reviewed in this court, is the record of the suit in which the judgment was given. In the case at bar the Supreme Court of Montana affirmed the judgment of the District Court on the *record* of the District court. And, even if it be true that the writ of error from this court was properly issued to the said Supreme Court, which acted on a transcript of the record of the District Court, it is nevertheless clear that the only record before the court is the same record that was before the said Supreme Court of Montana, to-wit: the record of the District Court of the First Judicial District in and for the County of Lewis and Clarke, Territory of Montana, beginning on page 3, of the transcript of record in this court, and ending on page 18, with the certificate of the clerk of said court.

The affidavit of Rawlinson T. Bayliss, and the exhibits therein referred to, filed December 13th, 1889, pages 18 to 30, inclusive, transcript of record, and the opinions of the Supreme Court of Montana, pages 31 to 41, ibid., inclusive, are no more a part of the "record" properly reviewable in this court than is the "Petition for Writ of Error," page 41.

Gibson vs. Choteau, 8 Wallace, 317, and cases cited by Justice Miller.

The only record in the Supreme Court of Montana, brought there by its writ of *certiorari*, reviewed by it, and the judgment in which was affirmed by it, was the record of the said District Court.

It is true that, in so reviewing that record, the Supreme Court of Montana affirmed the judgment contained therein, and sustained the validity of a State statute, on which the jurisdiction of the District Court to render that judgment rested, and which statute was drawn in question in the argument as being repugnant to the Constitution of the United States; but, as has been pointed out, the Supreme Court of Montana could do this, as bearing on the *question of the jurisdiction merely*, of the lower court. Notwithstanding, the record reviewed by it contained nowhere a specific claim that said statute was invalid, because unconstitutional.

But this court has laid down the rule that the record, reviewable by *it*, must show explicitly that the Federal question was raised and decided.

Keith vs. Clark, 97 U.S., 454.

So, in Railroad Co. vs. Rock, 4 Wallace, 177, Mr. Justice Miller on page 180 says: "It is probable that "counsel *in the argument* of the case, in the Supreme

"Court of Iowa, insisted that these matters were "involved. * * * * * But if the record does "not show that they were necessarily drawn in question this court cannot take jurisdiction." * * * * * Citing Lawton vs. Walker, 14 Howard, 149: "The "conflict of the State law with the Constitution of "the United States must appear on the *face of the record* "before it can be re-examined in this court. * * It "must be that such a question was necessarily involved "in the decision and that the State court would not "have given judgment without deciding it." Citing Mills vs. Brown, 16 Peters, 525. Had the present suit been appealed to the Supreme Court of Montana, as was attempted. (p. 16, transcript of record), and, as in effect it seems to have been considered in the judgment of said Supreme Court, p. 32, ibid., which begins thus: "This cause came on this day for the judgment and de-"cision of the court on appeal," although in the closing clause of the opinion of the court, p. 41, ibid., the court says: "The statute does not provide for an appeal from "the order which has been reviewed and the writ of "*certiorari* has been properly issued. We are of the "opinion that the District Court has not exceeded its ju-"risdiction in determining and granting the petition of "the St. Louis Mining and Milling Company, of Mon-"tana. It is, *therefore*, adjudged that the order and pro-

"ceedings of the District Court be affirmed with costs." Had there been an appeal instead of *certiorari*, we say it is clear that nothing could have been injected into the *record* of the suit as it transpired in the District Court. Counsel could only have raised the unconstitutionality of Sec. 376, *supra*, as a matter of *argument* in their briefs. This would have been ample ground for the Supreme Court of Montana in its function of supervising the inferior court's exercise of jurisdiction; but, as has been insisted upon by us, no Federal question would have been in that record of which the Supreme Court of the United States could have taken cognizance.

Now, in this case the "*certiorari*," as is its office, simply brings up the record of the lower court as *on appeal*. It could not have issued, had an appeal been provided by law, to take up the record. When it did bring up the *record* it was "*functus officio*."

The decision of the Supreme Court of Montana rested solely on that *record*, and in this court that record is the only suit in which a decision was had, either below or above, and should alone be looked to in ascertaining whether a Federal question be involved.

Certiorari is, where as in this case it supplies the defect of appeal, not itself a *suit*. It is simply a writ addressed to the court having the record of a *suit*, com-

manding it to send up that *record*. When this has been done there is but one suit before the higher court, to-wit: the suit contained in the remitted record.

The questions for decision in a higher court are not questions in a new suit called "*certiorari*," but are questions presented by the record of the only suit, to-wit: the one brought and heard in the court below. No judgment is rendered in a suit called "*certiorari*," but by "*certiorari*" the higher court, being in possession of the record of the inferior court, renders a judgment in the cause itself, which was heard below on the sole question, it is true, of jurisdiction of the lower court, but, none the less, on that question as presented by the record, and by the record alone, of that lower court.

The suit at bar is not the suit of the plaintiffs in error against District Judge Hunt, to whom the writ of *certiorari* was addressed. It is the suit of the St. Louis Mining and Milling Company against the Montana Company Limited.

Should this court take jurisdiction and render a judgment its mandate would result directly in affirming or annulling the judgment of the District Court in *that cause* by affirming or annulling the judgment of the Supreme Court of Montana *in that cause*.

We submit therefore that the affidavit of Mr. Bayliss is no part of the record of the *suit* before this court any more than is the petition of plaintiffs in error in this court for its writ of error or the writ of error itself; that consequently there is nowhere in the record of this suit a Federal question disclosed or necessarily involved.

IV.

By the act of January 12th, 1872, now Section 201, page 647 of the Revised Statutes of Montana, the "Common Law" was adopted as furnishing the jurisprudence of Montana. From the opinion of the Supreme Court of Montana in the present cause it is clear that that Court bases its decision affirming the validity of the Montana statute, Sec. 376, *supra*, on the ground chiefly that said statute was simply declaratory of a settled, pre-existing rule of jurispruudence at common law and hence, under the decisions of this court, no Federal question is presented.

West Tennessee Bank vs. Citizens' Bank, 13 Wallace, 432, citing Bethel vs. Demaret, 10 Wallace, 537, same vs. same, 14 Wallace, 9.
Palmer vs. Marston, 14 Wallace, 10.

In support of the motion to affirm we rely on the opinion of the Supreme Court of Montana in this cause, pages 32 to 41, inclusive, and on the facts as presented

by the record, especially the petition, pages 3 to 5, the order of Judge Hunt, pages 11 to 13, transcript of record, and the briefs of counsel for defendants in error in the Supreme Court of Montana printed herewith, as follows:

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There is no merit in the writ of error in this case. It is manifestly for delay and it should be dismissed and the judgment of the State Court affirmed.

Before proceeding to discuss this question, we quote Section 376, Chapter III., entitled "Actions Concerning Real Estate," Compiled Statutes of Montana, page 162, under which this contention arises:

Sec. 376. Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination or survey of such mine, lode or mining claim should be had or made; or whenever any inspection, examination or survey of any such lode or mining claim shall be necessary to protect, ascertain or enforce the right or interest of any person in another mine, lead, lode, or mining claim, and the person in possession of the same shall refuse for a period of three days after demand therefor in writing, to allow such inspection, examination or survey to be had or made, the party so desiring the same may present to the District Court, or a Judge thereof, of a county wherein the mine, lead,

lode or mining claim is situated, a petition, under oath, setting out his interest in the premises, describing the same, that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection or survey and his refusal so to do. The Court or Judge shall thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing, either party may read affidavits, and if the Court or Judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination or survey of the lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order.

Such persons shall thereupon have free access to such mine, lead, lode or mining claim, for the purpose of making such inspection, examination or survey, and any interference with persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner.

As counsel for plaintiffs in error have seen proper to argue at some length the feasibilty and propriety of the section of the statutes under which these proceedings were instituted and the great injustice that might follow from the character and extent of the powers sought to be conferred upon the Court or Judge, it may be well to advert for a moment to the material condition of affairs

which has brought about this contention. Were it not for the fact that so much stress is attributed to these propositions by able and experienced counsel we would content ourselves, by the bare suggestion that they are matters which address themselves to the discretion of the Legislative branch of our government and will not be disturbed by the Courts, unless there has been an attempt to exercise authority not lawfully possessed, by which the rights of some one are injuriously affected. In so far as the situation is concerned, material to the questions here involved, it will be seen from the record that the plaintiffs in error are the owners of the Drum Lummon Mining Claim: That the defendant in error is the owner of the St. Louis Mining Claim, each holding patents under the Government of the United States; that said mining claims are adjacent to each other and that plaintiffs in error, by means of a shaft and machinery upon its claim, and under-ground works at great depth, has penetrated into and through that portion of defendant in error's lode to which it is entitled under itspatent, has mined out a large portion thereof and is continuing and threatening to continue the same. That the said works are the only accessible means of ingress and egress to the place of trespass, afford the only means of information or acquiring evidence of material facts upon which to base an action and recovery, and that the

defendant in error desired and obtained the order for that purpose. In other words it discloses all the facts essential to a Bill of Discovery in equity and the maintenance of the same. Pursuing the doctrines of equitable jurisprudence in such cases the Legislative Assembly of the Territory of Montana enacted section 376 of our Code of Civil Procedure, auxillary to an action at law pending to be thereafter instituted and providing for the payment of the costs incurred in making the examination. inspection and survey.

It is claimed by counsel that the law is one of unusual hardship and might be used as an engine of oppression and injustice. The powers conferred by the act are only such as would have been possessed by the Court below in the exercise of its chancery jurisdiction without it. A more serious question than the one presented might arise had the Legislative Assembly under the Organic Act sought to deprive the Court of this jurisdiction instead of providing the mode of its exercise. Hence it is, the objection that the statute has sought to confer too much power upon the Court or Judge at chambers, is but a suggestion at this late day of the unfitness of ancient principles and precedents, as we shall hereafter see well grounded and universally maintained.

Indeed it would seem that nowhere could this discretionary power be more prudently or safely entrusted than in the Court or Judge where each case must and will stand upon its merits, and the exercise of a proper legal discretion is required. That it may be abused is an argument, if argument at all, that is applicable in all cases. It would apply with much more force where it is the province of the chancellor to award absolutely the right to property between contestants, than to instances like this affecting only the temporary use of the only available means of probing a fraud and trespass and affording a remedy and recovery on that account.

It is simply making the necessary use of the only accessible means employed in the perpetration of a fraud and commission of a trespass, in the possession and control of the wrong doer, to ascertain the extent of the injury and damage he has done. It makes the person who by secret and hidden means is committing a wrong produce the evidence thereof which he alone possesses. It is the only means by which subterranean piratical cruisers can be brought to the bar of justice, compelled to disgorge their ill-gotten gains and required to desist in their nefarious pursuit. When a petition and facts like these are presented to a chancellor, whether in

the exercise of his ordinary equitable powers as such or those especially conferred by statute, the rights of the petitioner cannot be ignored, without leaving him utterly remediless and at the mercy of his adversary. In the one case the order simply requires the use of the means employed in destruction of the property of the adjacent mine owner, while its refusal would result in the utter ruin of the property for which protection is sought. The feasibility and justice of the statute and order made in this case is rendered more apparent from the peculiar condition of affairs if the question is to have any bearing at all.

The plaintiffs in error, a foreign corporation with immense machinery and works, are engaged in gutting the mine of defendant in error at great depth under ground. Possessing the only means of ascertaining the facts sufficient to authorize a recovery, it virtually says by resisting the petition it will not permit the use of those means, will work out the mine, allow it to fill with water and leave you to your remedy against a bankrupt corporation in a foreign land. The property you own and have a right to hold and possess is so situated that you could not, if required to do so, make the necessary developments within time to prevent the consummation of its destruction. The statute we claim is based especially upon equitable principles. It makes the party hav-

ing the only evidence in his possession to permit it to be produced, and requires the use of the very means employed in the destruction of the property of his neighbor in the production of that evidence. In such case the law adjusts itself to the accomplishment of just and equitable ends. And when the bare use temporarily of these means are involved upon the one side and the total destruction of property upon the other, the course to be pursued is too apparent to admit of serious doubt.

Set aside the statute and dispense with the exercise of the equitable powers invoked in this case and the long chain of underground works of syndicates, corporations and individuals can at great depth undermine and destroy the property of adjacent mine owners, who have not the means or facilities of making the necessary discovery for their own protection. It is a showing properly made before the chancellor that means of ingress and egress are employed in the perpetration of an unlawful act and on account of which no vested right exists, that enables he Court to make the necessary order in the premises.

There is no difference in principle in compelling a party to produce in Court the evidence upon which his adversaries rights are based and requiring him to permit an inspection of that evidence in his possession and under his control and which is incapable of being produced in

Court. In the one case his time and services is taxed, in the other the temporary use of his property is taxed. This has been done for ages to meet the necessity of the case, the demands of justice and the enforcement of the relative rights and duties of mankind. He surrenders up this much for the benefits of society and the protection of the law.

We respectfully submit that the law is a salutary one, and without it, or the exercise of similar equitable powers which we claim are inherent in a court of chancery, the demands of justice will be defeated.

When the only evidence is under the control of the party and the necessity for it exists to protect a primary right, to deny its protection by whatever means are necessary is to deny the right. Nor can it make any difference whether this necessity for its productions exists preliminary to the commencement of the action, in aid of it or at the trial. It turns upon the question of necessity whenever and wherever it exists.

Officers under orders of the Court take possession of property before any trial of the right of it is had, receivers are put into possession of property before the right to disturb it is determined, parties are required to produce documents for inspection before the institution

of the action in which they are to be used, petitions for the taking and perpetuation of testimony in contemplation of a forensic contest are maintained, injunctions preventing the use of property are granted *ex parte* and before the right to it is adjusted. It is the fraudulent or wrongful use that gives a right to the injunction, and the use is property itself, and yet no lawyer will contend that this would be a taking in the sense of the constitution.

Bonds given in any case is not creative of the right, but a part of the remedy as a precautionary step in legal or equitable proceedings. It can contribute nothing in determining the constitutionality of a law like this.

And it is the inadequacy of legal remedies to afford proper and certain relief, or an adequate remedy, that gives rise to a right of *discovery*. And the right to discovery when the ends of justice demand it, is not to be determined by the disclosures the party may make upon oath when he has better and higher evidence under his control. The rules of evidence in such cases would suggest the production of the best evidence, and the principles applicable to a discovery would follow the rule. In this case an inspection and survey of the premises is the best evidence and will produce the facts with certainty and precision. It is because it is evidence

and its production necessary that gives the equitable jurisdiction for a discovery.

Again, just such use and control over property as may be exercised by police regulations without compensation to the owner can be exercised by the Courts without being obnoxious to the provisions of the Federal Constitution relied upon by appellant to overturn the statute. If the State has a right to inspect mines through an officer appointed for that purpose, to prevent the fraudulent use of underground works without condemnation and compensation, which is often done, it could certainly be no objection that this power is vested in the Courts, and its exercise based upon a proper showing and upon notice. Upon the principle that this power can be exercised as a police regulation by the State, for the public good, it is likewise inherent in the Courts on account of being *evidence*, and necessary to the administration of justice.

The statue with this end in view leaves it with the Court to fix the notice required from all the surroundings, and gives an opportunity to be heard upon the *bona fides* merits of the application for the order, and when this course is pursued it is in accordance with the laws of the land. These principles have long been

applied and will continue to be applied by Courts of Equity to other than mining property.

When underground excavations are about to sink or destroy the property of an adjacent land owner under such circumstances as entitle him to protection, an inspection and survey for the purposes of discovery have uniformly been ordered.

And the fact that the statute fixes the minimum of time allowed for the notice does not enlarge the powers, or subject it to greater abuses that if no limitation was had and the matter was left as it otherwise would have been, to the discretion of the chancellor. If the case was shown to be urgent, so as to demand the immediate interposition of preventive remedies and the inspection and survey was absolutely necessary to procure this remedy, a hearing would be had at the earliest possible period. The law therefore instead of being objectionable upon this ground as urged, seeks to some extent to limit and control the powers a Court of equity otherwise possessed.

Propositions similar to those presented here, arose in the case of Stockbridge Iron Company vs. Cone Iron Works in the State of Massachusetts, and the power was exercised without being questioned by learned counsels for able judges. The case will be found

reported in 102 Mass. 80 *et seq.* After discussing the rights of the plaintiff having only a reversionary interest to maintain the suit the Court says: "It is contended "that the power of the Court in allowing costs depended "on Gen. Stat. c. 156 sec. 16, and that this section does "not authorize the allowance of these expenses. But "Courts of law have power to allow the reasonable "expenses of surveys and views in proper cases, and the "fee bill does not apply to the expense of such proceed-"ings. Mines are so situated that special and peculiar "means are sometimes necessary in order to attain the "reasonable ends of justice in regard to the underground "passages by which access may be obtained to them by "trespassers." The circumstances of that case were quite similar to this and show that where it is necessary to use the works of a trespasser upon his own ground to establish the injury done to his neighbor the Court has power to appoint persons to inspect and survey the underground passages and excavations, and that it is not limited in such cases to the general fee bill in awarding costs, but may allow what is reasonable and necessary including the use of defendants works. The contention was based upon the theory, as will be seen from the statement of the case, that the whole object was "in the nature of a preparation for trial by *discovery* and *collection of evidence*" and nowhere does the Court intimate a want

of power, or propriety in its exercise. And in a well considered case under a similar statute to the one in in question, an elaborate opinion will be found in volume 7, Morrison's Mining Reports pp. 667-680 and 681, in which the Court says:

"The foregoing statement comprises the facts which up to this period have occurred in this case. The propositions of law which they involve are:

First—Ought a Court of Equity, in a mining case, when it has been convinced of the importance thereof for the purpose of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a Court of Chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is obtainable in a court of law.

That a Court of Equity, having jurisdiction of the subject matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising that power would seem to be clear, in cases where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious

that the facts by which this controversy must be determined cannot be discovered except by inspection of works in possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which Courts were created, for them to refuse to exert their power for the elucidation of the very truth —the issue between the parties. Can it refuse to learn the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz., Bainbridge on Mines.

Of course, before granting an order of this kind the Court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected."

The Court here concedes the power given under the statute and that it is analagous to that possessed by Courts of Chancery without it, and proceeds to discuss the propriety only of making the order. The last is intended to afford protection to the public, owning or engaging in the working of mines to prevent secret underground frauds and trespasses, is a proper exercise of the police powers of the State and may be invoked by anyone suffering or about to suffer from the evils intended to be prevented.

This seems to be the rule laid down by Mr. Tiedman, in his work on Limitations of Police Powers, page 207, section 89.

But it is too clear that this is an inherent power in a Court of Equity, as an essential element in the due administration of justice. It pertains to, the production of evidence indispensible to the trial of issues involving the rights of litigants, and without it the machinery of the Courts is powerless and our legal and equitable jurisdiction a mockery and a sham. If the Court inherently possessed the power and the proceeding is in the nature of a discovery, as we claim it is, the Courts have uniformly held that it is proper for the Legislative Assembly to prescribe the mode of exercising it, and this is all that is done by the section mentioned. Courts have the inherent power to fine for contempts and imprison the offender without a jury trial, and yet has it ever been successfully claimed that this is in violation of any of the provisions of the Constitution. Search warrants are issued when property is concealed belonging to another, and the question of the ownership of the premises to be searched is not material to the jurisdiction in issuing the order before a hearing. Upon petitions for the perpetuation of testimony in *contemplation* of litigation akin to the question here involved, courts order the taking and production of testimony upon notice to the opposite party.

This is emphatically a bill filed for the purpose of obtaining an order for the production of testimony, and the order is in the nature of an interlocutory order, because in contemplation of litigation and essential to the trial of the rights involved. The notice to be given is in the discretion of the Court, in the exercise of its powers as a part of the frame work of our equitable jurisprudence. It does not pertain to the common law and is not governed by the principles contended for by counsel and embraced in the amendments to the Constitution of the United States. It involves the question of the power to require the production of the best evidence in furtherance of judicial proceedings. It is insisted, however that a suit should be pending at the time the order is made. The sophistry of this proposition is seen at first blush. If the grounds upon which the want of power exists, arise on account of the unconstitutionality of the section of the statute, or jurisdiction exercised as a chancellor, because it is a taking of property without due process of law, it necessarily follows according to the logic of counsel that a jury trial of the merits must be had. It is difficult therefore to see what difference it makes whether the order is granted in an independent proceeding in view of an action, or upon petition during the pendency of an action. In either case it is in advance of a trial and not founded upon a verdict of a

jury, as contemplated by the constitution in common law actions when legal rights are at stake. No, if this evidence is essential on the trial, it must be had beforehand, or at least during the trial. In every instance it must precede the judgment and verdict.

The very purpose of the testimony is to aid the jury in rendering a verdict and enable the Court to pronounce judgment upon the rights of the respective parties. According to the views expressed by counsel plaintiff in error is entitled to a jury trial and the condemnation of and payment of damages for the use of its works before such an order could be made. This is fallacious and puerile for two invincible reasons: 1st. Condemnation could only be had for a public purpose; and, 2nd. It would require the same identical testimony in question to show the necessity for it if it could be condemned for private purposes. It is tantamount to say that the merits of the controversy to be setttled between the parties should be first tried, and the order be made a part of the decree. In other words, you cannot get a judgment or decree without the evidence, and you are not entitled to the evidence until you get your judgment or decree, *i. e.* you have no rights at all. Where the enjoyment of a right depends upon a remedy the remedy is a part of the right itself. Constitutions are intended for the pro-

tection and enforcement of rights, and not the prevention and destruction of them.

The *converse* of the position of counsel is entitled to far more consideration upon *constitutional* grounds than the position taken. If, as conceded for the purposes of this case, defendant in error is the owner of the ore being taken out, and the evidence sought is essential to obtaining the right, a denial of the evidence is a *denial* of the right. The constitution instead of protecting the right to property allows it fraudulently and tortiously to be taken by interposing an insurmountable barrier to its protection and preservation. It stands between the owner and wrong-doer and aids in the taking of property without due process of law. The only question is, is it the *best evidence*, and is it absolutely necessary in maintaining justice? If so, withholding it is defeating the ends of justice, which Courts were instituted to uphold. There is no other mode of obtaining this evidence. While the authorities hold that the law allowing the testimony of appellants, does not oust the equitable jurisdiction of the Court or dispense with the right to the best evidence, it does not meet the case. It is the examination, survey and inspection that is desired. This may or may not have been done by plaintiffs in error, and they may be wanting in the knowledge required. This is not a case where

the knowledge rests exclusively with plaintiff in error, who may be compelled to disclose it on oath. It presents a question where physical facts are in its possession and under its control, *the best evidence*, and capable only of being produced in the manner in which defendant in error seek to produce it. Every right has a remedy. If by reason of the generality of the law or otherwise *it* is inadequate, equity steps in and performs the necessary office. Should the Legislative Assembly have sought to take away a remedy absolutely essential to the enjoyment of the right, it would be nothing short of confiscation. And a constitution that would shield a wrong-doer, except in the particular instance where he is not required to criminate himself, by allowing him defiantly to withhold the evidence upon which his neighbor's rights depend, and thereby secure his property without consent or reward, would not be in keeping with the civilization of the present age.

Plaintiffs in error put themselves in the attitude of saying to the Court, there is evidence in existence that will establish the rights of defendant in error, in its possession and under its control, and without which, such rights cannot be established, but the Court is powerless to produce it, notwithstanding it is a party to the litigation and *perpetrator* of the *trespass* complained of. Our

statute has never sought to abolish actions to obtain a discovery, except in as far as it pertains to disclosures under oath, while it expressly provides for the disclosures resulting from examinations, surveys and inspection of underground works which is in the nature of a discovery, and the very purpose of which is to enable a party to establish and maintain his rights in an action at law. Conceded that in common law actions this could not be done for the reasons as cited by counsel for plaintiff in error, equity then comes to the rescue in securing even and exact justice. It is a doctrine familiar to the practitioner in the Territories that the chancery powers conferred upon the District Judge under the organic act, is such as is exercised by the Courts of Chancery in England, and that the mode of its exercise may be defined by the Legislative Assembly as is here done, but that it cannot take away the jurisdiction. What then were the powers of the Courts of equity under its system of jurisprudence in England. Upon this question see

Bennett vs. Whitehouse, 28 Beavans 119 reported in 8th Morrison Mining report, page 17.
8th Hare, 97.
Same Mining Report, page 14. 9. Bligh (O. S.) 172. L. J. Q. B. 98.
Bennett vs. Griffith, 8 Morrison Mining Report 21.
Whaley vs. Brackenrid, 29 10 Law. Times. N. S. 155.

When the Legislative Assembly can provide for the

appointment of an inspector it can place the power of appointment in the court. The right of a Court to order an inspection, examination and survey of a mine in the adverse possession of a party to the contention, when it is necessary to the protection or maintenance of a right, we venture has never before been questioned. It is to prevent a forfeiture and sacrifice of property that it is done, and is based upon the same principle as an order and injunction to permit the representation of a mine when a representation is required. Such right and power either exists in the court by statute, or is otherwise exercised by reason of its equitable powers.

Thornburg vs. Savage, 1st Pac. Law M. 267.
Thornburg vs. Savage, 7 Morrison M. R.
The Thomas I. Co. vs. Allertown M. Co., 28 N. J. E. 77.
The Thomas I. Co. vs. Allertown M. Co., 8 Morrison M., R. 36.
102 Mass. Supra, 6 M. R. 317-175.
6 Nev. 291, 3 Kay & Jay 695.

The Supreme Court of Nevada recognized the equitable powers before the passage of the statute of that State. California, Colorado, Nevada, Idaho and Montana all have statutes similar in so far as the questions here involved are concerned, and their validity has not been questioned.

See also 1st Pomeroy Eq. Ju., sec. 230 & 216, *id.* 205, 201, 197 & 198.

Greenleaf on Evidence, 13th Ed. Vol. 3, sec. 328.
Kyvaston vs. E. Ind. Co., 3 Swanst 249.
Hunt on Boundaries and Fences, 67.
Rapalje & Lawrence Law Dictionary, 147 § 4.
Comstock vs. Apthorpe, 8 Cowan 386.

We come irresistibly to the conclusion that when the only use sought to be made of a litigant's property is such as is absolutely necessary to establish the primary right of his adversary, and without which such right would fail, the chancellor upon an application for that purpose will require the production, inspection and use, if under his control, as evidence, and that it is not a taking in the sense of the Federal Constitution.

E. W. TOOLE,
Of Counsel for Defendants in Error.

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After a very careful reading of the brief of plaintiffs in error we are led to believe that but one question is relied upon, viz.: the constitutionality of section 376, under which the proceeding was instituted, and as near as we are able to ascertain from the brief, the constitutionality of this section is contested upon the following grounds:

First. That the rights given by the acts may be so exercised as to become unjust and oppressive.

Second. That it is partial, special or class legislation.

Third. That no appeal is granted by the terms of the act, from the order of the Court which may be made in the premises.

Fourth. That no security is required of the petitioner to pay damages in case he has no right of investigation.

Fifth. That the right of trial by jury is not granted.

Sixth. That it deprives a person of his property without due process of law.

Before entering into a consideration of these propositions, it might be well to examine the provisions of the sections complained of.

It gives any person having a right to or interest in, any lead, lode or mining claim, which is in the possession of another person, when it becomes necessary for the ascertainment, enforcement or protection of such right and interest, that an inspection, examination or survey of such mine, lode or mining claim should be had or made, the right to have such inspection, examination or survey made. It also gives any person, wherever an inspection, examination or survey of any lode or mining claim shall be necessary to protect, ascertain or enforce the right or interest of any person in another mine, lead, lode or mining claim, the right to have an inspection, examination or

survey to be had or made. That is to say, it provides for two classes of cases, and gives the right to an examination, inspection or survey under two different circumstances.

1st. Where the person has an interest in property which is wholly in the possession of another person.

2nd. Where it is necessary to protect, ascertain or enforce the right or interest of any person in any mine, lead, lode or mining claim, other than the one which is in the possession of the other party.

Thus, as an illustration of the first class of cases, if A is in possession of a mining claim in which B has an interest or a right, he is entitled to have a survey or examination made of the property in A's possession.

An illustration of the second class would be where A has the legal title to a certain lode and the vein therein dips from its side line into an adjoining claim in possession of another party.

These are the rights given, and the remainder of the section refers entirely to the procedure whereby the rights may be enforced. First, it requires that a demand in writing shall be made upon the person in possession of such premises for the period of three days, to allow such inspection, examination or survey, and if such demand be

refused, the party desiring such inspection, examination or survey, must apply to the District Court or Judge of the County wherein the property is situated, by petition under oath, setting up his interest in the premises, fully describing the same, alleging the possession of the same in the other party, giving the reason why such examination, inspection or survey is necessary, and setting forth the demand and refusal. Upon the presentation of this petition the Court or Judge fixes a time and place for hearing the same, and requires notice of such hearing to be served upon the other party at least one day before the day fixed for such hearing. On the hearing, either party may read affidavits, and if the Judge is satisfied that the facts stated in the petition are true, he shall make an order for such inspection, examination or survey, in such manner, at such time and by such persons as are mentioned in the order. Then, for the purpose of fully carrying out this order, the statute provides that the persons named therein shall have free access to the mine, and any interference with such persons, while acting under such order, shall be contempt of Court.

I.

Is the law unconstitutional because it may become oppressive?

We find a better argument upon this question than we are able to make, in Cooley's "Constitutional Limitations," Fifth Edition, pages 197, *et seq.*, and cases cited, being the 4th subdivision of chapter 7 of that work. We adopt what is said by Judge Cooley as our argument without further reference.

II.

Is the act unconstitutional as being partial, special or class legislation?

Judge Cooley sums up the doctrine with reference to this class of legislation as follows: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to or locality to which they apply, and they are then public in character, and of their propriety and character the Legislature must judge." Cooley's "Constitutional Limitations," page 483 and cases cited. No further reference is necessary.

III.

Is the law unconstitutional because no appeal is granted by the terms of the act.

The right of appeal is purely a statutory right and not a constitutional right. Therefore the Legislature

has full power to give this right in such cases as it may see fit, and where it is not given, it does not obtain.

Cooley's Con. Lim., Fifth Ed. 474.
Grissler vs. Fowler, 55 N. Y., 675.
Hewlett vs. Elmer, 103, N. Y., 156.
Maxfield vs. Freeman, 39 Mich. 64.

IV.

Is the statute void because no security is required of the petitioner to pay damages in case it is afterwards ascertained that no right of investigation exists?

It would be a very peculiar doctrine to hold that in all cases a bond or other security should be required before any proceedings might be instituted in any court. Laws of that kind are never passed, and the furthest the legislatures have ever gone is to provide that upon certain showings being made by the defendant, the plaintiff might be required to give security. The case of Marsh vs. Steele, 31 Amer. Repts. 406, holds that a law is not unconstitutional which allows an attachment without requiring the filing of a bond.

V.

Is the law unconstitutional because it does not give the party the right of trial by jury?

It is claimed by defendant in error that for this reason

the act is in violation of Section 23, Article 3, of the Constitution of the State of Montana, which provides that the right of trial by jury shall remain inviolate.

This provision is similar to that in the constitution of almost all other States, and has received judicial construction under a variety of circumstances, and it has been invariably held that it means that in whatever cases the right of trial by jury was guaranteed or allowed prior to the adoption of the constitution, such right should continue in such cases. The Courts have just as universally held that such provision does not apply to cases where no right of trial by jury was given prior to the adoption of the constitution nor to proceedings established after the adoption of the constitution.

Lee vs. Tillotson, 24 Wend. 336.
Ross vs. Irving, 14 Ill. 171.
Exparte Carpenter, 64 Cal. 266.
Flint River Co. vs. Foster, 5 Ga. 194.
R. R. Co. vs. Heath, 9 Ind. 558.
Whallen vs. Bancroft, 4 Minn. 70.
Work vs. State, 2 Oh. St. 297.
Gaston vs. Babcock, 6 Wis. 490.
Stilwell vs. Kellog, 14 Wis. 461.
Frazer vs. Bratton, 2 S. E. 125.

It is very apparent that this provision of our statute had been in force for several years prior to the adoption of our constitution, and therefore under the construction of that clause in the constitution, as herein above recited,

the act, not having given the right of trial by jury, such right does not attach because of this provision of the constitution.

The following are some of the proceedings, involving important rights, of neither an equitable nor maritime jurisdiction, in which it has been settled by many decisions, the parties are not entitled to a jury trial.

1. Proceedings by the State under its right of eminent domain.

Livingston vs. Mayor, etc., New York, 8 Wend. 85.

2. Proceedings to determine the right to office under an election.

Whallon vs. Bancroft, 4 Minn. 109.
The statutes of Montana also authorize this proceeding

3. Proceedings to assess, on property benefited, the damages for taking lands for highways.

People vs. Mayor, etc., of Brooklyn, 4 N. Y. 419.
Atherton vs. Sherwood, 15 Minn. 221.

4. Proceedings to appoint guardians of insane persons.

Gaston vs. Babcock, 6 Wis. 503.

5. References to assess the value of improvements

under occupying claimants' laws, where such mode of assessment existed at the adoption of the constitution.

Ross vs. Irving, 14 Ill. 171.

6. Suits uniting the legal cause of action to recover debt, with the equitable cause of action to foreclose a mortgage given to secure it.

Stillwell vs. Kellogg, 14 Wis. 461.

7. Actions to enforce liens given by statute upon vessels for labor and material.

Sheppard vs. Steele, 43 N. Y. 52.

8. Proceedings to determine the settlement of paupers.

Shirley vs. Lunenburg, 11 Mass. 379.

9. In proceedings for the assessment and collection of taxes.

Crandall vs. James, 6 R. I. 144.

10. Summary proceedings for the ejecting of tenants.

Frazee vs. Hatton, 2 S. E. 125.
Carter vs. Camden Dis. Ct. 10th A. 108.

Counsel for the plaintiff in error seems to be impressed with the idea that at common law the question

of title to real estate could only be tried by a jury. In reply to this we take two positions.

First. That there is no trial of any title to real estate authorized under this proceeding, and

Second. If there was such authorization, counsel is mistaken in his position that at common law the question of title could only be tried by jury.

First. The entire purpose of this act is to permit a person, under circumstances set forth in this act, to have an investigation made for the purpose of maintaining an action thereafter to be commenced. It is simply a statute allowing a person to compel the opposite party to produce evidence wholly and solely within his charge, so that the rights of the parties may be settled in future litigation. It is not trying the title to anything, and the order of the Court or Judge allowing such investigation to be made, is not *res adjudicata* as between the parties in any proceeding relative to the title to the property. True, the Court must be satisfied that the petitioner has a right or interest, direct or incidental in the property in possession of the defendant, but it is not a trial of the titles of the parties, but is merely preliminary, and not conclusive upon anything. There are many rights and interests which one person may hold in property in possession of the other, which do not attain the dignity

of a title, and the provisions of our laws are so full, relative to the trying of titles, that there should be no question in the minds of any one that no title could be tried under this proceeding.

Counsel for plaintiff in error, page 3 of their brief present our ideas of this proposition of the case when they say, "The quality of right to or interest in the mining claim to be shown by the petitioner is not defined. Any interest, however small, or any right however vague, indefinite or uncertain, which the petitioner may show by his affidavits, is sufficient to bring him within the purview of the law, and a Judge would not be justified in refusing relief if he were satisfied the petitioner had any right of any character or description."

Second. But suppose it does authorize the trial of titles. Titles were not always tried by jury at the common law.

Ellithorpe vs. Buck, 17 Oh. St. 75.

Again, it is a rule of judicial construction that a law will be so construed, if possible, as to render it operative, so that if this act would be unconstitutional construing it to authorize the trial of title to land, such construction should not obtain, as the act does not on its face directly authorize such procedure.

VI.

Is the law unconstitutional because it deprives a person of his property without due process of law?

Perhaps no question under the Constitution of the United States, or the Constitutions of the several states, has ever been before the courts and received judicial construction more frequently than this, and no set or perfect definition has yet ever been successfully attempted, but each case is construed to stand upon its own particular facts, and the decisions are all upon such particular facts, and not upon general definitions.

Justice Miller, in Davidson vs. New Orleans, 96 U. S., 97, determines that it is impossible to define the words "due process of law," so that such definition would cover every exercise of power thus forbidden to the State, and exclude those which are not, and in conclusion he says: "But apart from the imminent risk of a failure to give any definition which would at once be perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining and application of such an important phrase in the Federal Constitution, by the gradual process of inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

As somewhat illustrating the different classes of cases and the opinions of the different Courts, we cite the following authorities:

Hurtado vs. California, 110 U. S., 516.
Walker vs. Savinet, 92 U. S., 92.
Kennard vs. Louisiana, 92 U. S. 480.
Davidson vs. New Orleans, 96 U. S., 97.
See also note to Railroad Tax Cases, 13 Fed. Rep. 782.

Judge Matthews in the case of 110 U. S. *supra*, concludes his consideration of numerous cases with the following language: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of legislative power in furtherance of the general public good, which guards and preserves these principles of liberty and justice, must be held to be the process of law."

This all applies to the sufficiency of the proceedings authorized by this statute, but it leaves one question for further consideration, viz., whether the exercise of right given by the statute amounts to a taking of the property within the meaning of the constitution.

We submit under this statute there is no taking. In order that property be "taken" within the meaning of the Constitution there must be a permanent deprivation of the owner of his property, either by a physical taking

thereof, or by interference with the use or enjoyment thereof.

Here the right given is fugitive in its character, temporary in its nature, without any element of permanency. It is similar to the provision of the statutes allowing surveys prior to proceedings for condemnations of lands for public purposes, and for other investigations of necessary facts as is illustrated by the following cases:

Winslow vs. Gifford, 6 Cush, 327.
Land Co. vs. Seymour, 35 N. J. Law, 47.

But, irrespective of the foregoing questions, it seems to us that the following renders our position impregnable:

The rights given by this statute are not new ones, but have been recognized by the common law for almost a century and the statute itself is simply declaratory of the common law in this regard, giving a specific mode of procedure.

Thomas Iron Co. vs. Allerton M. Co., 28 N. J. E. 77, 8 Morrison M. Rep. 86.
Lewis vs. Marsh, 8 Hare 97, 8 Morrison M. Rep. 21.
Bennett vs. Whitehouse, 28 Beaven 119, 8 Morrison M., Rep. 21.
Bennett vs. Griffith, 30 L. J. Q. B. 98, 8 Morrison M. Rep.
12 Whally vs. Brackner, 8 Morrison M. Rep. 29.
Earl of Lonsdale vs. Curwen, 3 Bligh O. S. 168, decided in 1799, 7 Morrison M. Rep. 693.
Stockbridge Iron Co. vs. Cone Iron Works, 102 Mass. 80, 6 Morrison M. Rep. 118.

We submit that the law is constitutional, and inasmuch as no question is raised as to the regularity of the proceedings, the order appealed from should be affirmed and the Court directed to proceed with the contempt proceedings.

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Of Counsel for Defendants in Error.